United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1037

To be argued by
LAWRENCE S. FELD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 74-1037, 74-1068, 74-1140, 74-1143, 74-1144 and 74-1148

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN CAPRA, GEORGE HARRIS, ALAN MORRIS, LEOLUCA GUARINO, STEPHEN DELLACAVA, and ROBERT JERMAIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

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Preliminary Statement

John Capra, Leoluca Guarino, Steven Dellacava, Robert Jermain, George Harris * and Alan Morris appeal from judgments of conviction entered on January 3 and 11, 1974 in the United States District Court for the Southern District of New York, after a five week trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 73 Cr. 460, filed on May 16, 1973, charged the six appellants and five others—John Caruso, Earl

* Counsel for Harris has moved, pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), to be relieved as counsel on the ground that the record presents no non-frivolous issue for appeal as to Harris. The motion is scheduled to be heard on May 9, 1974.

Simms, Joseph Messina, Jack Brown and Carmelo Garcia—with various violations of the federal narcotics laws.*

Count One charged all the defendants with conspiracy to violate the federal narcotic laws in violation of Title 26, United States Code, Sections 4705(a) and 7237(b) and Title 21, United States Code, Section 846.

Counts Two and Three charged Capra, Guarino, Dellacava and Jermain with selling two kilograms of heroin in August, 1970 and one kilogram of heroin on November 6, 1970 in violation of Title 26, United States Code, Sections 4705(a) and 7237(b). Counts Four and Five charged these same four defendants with distributing and possessing with intent to distribute five and one-half kilograms of heroin and one kilogram of cocaine in October, 1971 in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Six charged Capra, Guarino, Dellacava and Garcia with distributing and possessing with intent to distribute one-half kilogram of heroin on January 17, 1972.**

Trial commenced on October 18, 1973 as to the six appellants.*** On November 22, 1973, the jury found Capra, Guarino, Dellacava, Jermain, Harris and Morris guilty on all counts in which they were named.

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* Indictment 73 Cr. 460 superseded Indictment 73 Cr. 331 filed April 13, 1973.

** Count Six was severed and dismissed prior to the commencement of trial.

*** Three of the remaining defendants—Simms, Messina and Garcia—were each severed prior to the commencement of trial. Simms, a Government witness at trial, entered a guilty plea on October 17, 1973 to a superseding information (73 Cr. 969) charging him with conspiracy to purchase and sell narcotic drugs not in or from the original stamped package in violation of 26 U.S.C. 4704(a) and 7237(a). Judge Frankel sentenced Simms on January 4, 1974 to a term of one year and one day. A *nolle prosequi* was filed as to Messina and Garcia. The remaining two defendants—Caruso and Brown—were not available for trial.

On January 3, 1974 Judge Frankel imposed the following sentences: Capra and Guarino were each sentenced to a term of 15 years imprisonment to run concurrently on Counts 1, 2, 3 and 5 and a term of three years imprisonment on Count 4 to run consecutively to the 15 year term with a term of special parole of six years to follow. Capra and Guarino also were fined $25,000 on Count 1 and $20,000 on Count 2, making a total of $45,000. Dellacava was sentenced to a term of 15 years imprisonment to run concurrently on Counts 1 through 5 with a term of special parole of six years to follow. Jermain was sentenced to a term of 12 years imprisonment to run concurrently on Counts 1 through 5 with a term of special parole of six years to follow. Morris was sentenced to a term of eight years imprisonment to run concurrently with the five year sentence imposed on him in the Eastern District of Michigan on August 15, 1973.* On January 11, 1974 Harris was sentenced to a term of 13 years imprisonment to run concurrently with a nine year sentence imposed by Judge Frankel on Indictment 73 Cr. 392 on October 5, 1973 for violations of the federal narcotics laws with a term of special parole of five years to follow.**

The defendants are presently serving their sentences.

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* The five year sentence imposed on Morris in Michigan is to run consecutive to two terms of not less than ten nor more than twenty years imposed on August 30, 1972, in the Lucas County Court of Common Pleas for violations of the narcotics laws of the State of Ohio.

** This Court affirmed from the bench Harris' conviction on Indictment 73 Cr. 392 on January 11, 1974. *United States* v. *Harris*, 489 F.2d 753 (2d Cir. 1974).

Statement of Facts

The Government's Case

1. Introduction

The investigation and prosecution of this case exposed a major narcotics ring whose operations were centered in Manhattan and the Bronx. This tightly knit and highly organized illicit enterprise was supervised by Capra and Guarino. Dellacava, their trusted lieutenant, managed the day to day distribution of narcotics to the organization's customers.

The Capra-Guarino ring not only supplied narcotics to customers in the New York City area, but was responsible for distributing massive quantities of heroin and cocaine to various points in the middle west. During 1970 and 1971 Jermain and his partner, co-conspirator, Joaquin Ramos, the Government's chief witness at trial, purchased large quantities of narcotics from Capra, Guarino and Dellacava and resold them to Harris, Simms and Morris, their principal customers in Detroit, Michigan.

In March 1973 co-conspirator Herbert Sperling, a major narcotics dealer who had been associated with the conspiracy for several years, became a member of the executive group with Capra and Guarino. Co-conspirator Joseph Conforti testified that during March and April 1973 he and defendant John Caruso tested, mixed and packaged multi-kilo quantities of pure heroin for delivery to customers of Capra, Guarino and Sperling.

2. Capra and Guarino agree to supply Ramos with heroin and cocaine

The relationship between the Capra-Guarino organization and Joaquin Ramos began in the summer of 1969. Ramos, who had been released from federal prison early

that summer, was introduced by one Marco Delgado to the members of the Havemeyer Social Club in the Bronx. At the club Ramos met an old friend, Leoluca Guarino, who, in turn, introduced him to his partner John Capra and to Stephen Dellacava. On this first visit to the club Guarino placed $500 in Ramos' coat pocket and told him not to do "anything" with Delgado. He also gave Ramos his phone number and said he would explain his reasons later (Tr. 142-47).*

When Ramos returned to the social club several days later, Guarino told Ramos that he could supply him with narcotics if Ramos intended to resume selling. After quoting a price of $17,500 per kilo of heroin, Guarino advised Ramos to get himself a good black customer like defendant Jack Brown, because "that's where the money's at" (Tr. 148-50).**

Ramos began frequenting the Havemeyer Social Club three or four evenings a week. Guarino, Capra and Dellacava would be there often. Dellacava would usually arrive carrying a brown paper bag containing large quantities of cash in small denominations, which he explained came from customers such as Jack Brown. Ramos often assisted in counting this money and sorting it in stacks of $1,000 each (Tr. 150-52). There were three "traps" or hidden compartments in the club which were used to store the cash, as well as equipment for testing the purity of heroin (Tr. 159-62).

In the fall of 1969 Ramos decided to accept Guarino's offer and resumed selling narcotics. Alex Metro, after

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* References to the transcript of trial will be cited to their original page numbers and will appear as "Tr. ....."; "GX" refers to Government Exhibits in evidence; "JA" refers to the Joint Appendix of Capra, Guarino and Dellacava and "A." and "Br." to the Appendix and Brief of the specified defendant.

** Ramos knew Brown from prison (Tr. 149-50).

first being cleared by Guarino, became Ramos' first partner. They had two customers whom they supplied with approximately a quarter kilo of narcotics per week. In each instance the order was placed with Capra or Guarino at the club; Dellacava then drove to the "stash" and returned, leaving the automobile in the vicinity of the club with the narcotics in the trunk. Dellacava would always drive around several hours before going to the "stash" to ensure that he was not being followed. The narcotics were given to Ramos and Metro on consignment and Ramos customarily paid Capra after the "package" was delivered to the customer (Tr. 152-60).

3. Ramos and Jermain become partners

In the early part of 1970 Metro and Ramos decided to split up. They divided the proceeds of their partnership and each kept one customer. Shortly after Metro went off on his own, Ramos was introduced to Robert Jermain by Capra and Guarino. Jermain asked Ramos if he was interested in becoming his partner in the narcotics business. After Capra and Guarino approved the proposed partnership, Ramos and Jermain began selling quarter kilos of heroin. By March, 1970, however, Capra and Guarino suggested that Ramos and Jermain cease their large number of relatively small drug sales and instead secure a customer who would order large quantities of narcotics at a single time (Tr. 182-185).

George Harris, a major drug dealer from Detroit, who had previously purchased drugs from Jermain, was reportedly interested in buying large quantites of narcotics. A meeting with Harris was arranged. With his associate, co-conspirator Horace Stanley Marabel, Harris flew from Detroit to New York City in March, 1970 and met Jermain and Ramos at Hugh Grant Circle in the Bronx. All four

rode in Jermain's car and discussed the details of their proposed narcotics dealings. Because Harris owed Jermain a substantial sum of money for narcotics previously delivered on consignment, Jermain and Ramos informed Harris that in all future transactions, he would be required to pay in advance for narcotics. Incensed at this demand, Harris told Jermain: "We made a couple of million dollars together. Why are you treating me this way?" Harris, however, reluctantly consented to the new arrangement and agreed to contact Jermain when he was ready to begin doing business (Tr. 185-188; 252-54, 267).

4. The Harris Transactions

Through the remainder of 1970 Harris made several large purchases of narcotics from Jermain and Ramos. Harris frequently sent his associate, Earl Simms, to New York to pick up the drugs. On several occasions Harris accompanied Simms to New York for this purpose. In each instance the narcotics received from Jermain and Ramos were supplied by Capra, Guarino and Dellacava.

On November 5, 1970, Harris and Simms met Jermain at Grand Central Station.* They then rode in Jermain's automobile to Tom's Villabianca Restaurant in the Bronx. Simms, who had carried the purchase money in a brief case from Detroit, left it in Jermain's car before walking into the restaurant. Shortly after they arrived, Ramos entered the restaurant and a discussion ensued concerning the purchase of one kilo of heroin. Ramos, under surveillance, then left the restaurant and drove to the Havemeyer Club to place an order for the one kilo. Since Capra and Guarino had not yet arrived at the club, he told Dellacava that the "people had just come in" and that

* This transaction was observed from beginning to end by federal narcotics agents and New York City police officers and became the subject matter of Count Three.

he would return to the club later. Ramos returned to Tom's Villabianca and told Jermain about what had happened. All four then departed in two automobiles and drove to the Town and Country Motel in the Bronx where Harris and Simms registered. Jermain and Ramos remained with them for about 45 minutes and discussed arrangements for the delivery of the kilo which they agreed would take place the next day. As they left the motel room, Jermain told Ramos that the money for the kilo of heroin was in the trunk and that he would take care of the delivery of the narcotics (Tr. 259-62; 1034-38; 1106-10; 1330-34; 1563-64).

The following evening Harris and Simms met Jermain at Hugh Grant Circle. They drove to Manhattan in Jermain's automobile under surveillance. In the car Jermain handed Harris two packages containing the kilo of heroin. Jermain then dropped Harris and Simms off in Manhattan and they ultimately returned to Detroit (Tr. 1336-39; 1566-67).

In December, 1970, Simms picked up his last package of narcotics in New York for Harris. On the evening of December 6 Simms met Jermain in front of the Commodore Hotel in Manhattan. Simms joined Jermain, who was parked in his Mercedes Benz, and ordered a half kilo of heroin. Jermain told Simms that he would take care of it. The following evening, December 7, Simms, Jermain and Ramos, under surveillance went to the Muhammad Ali-Oscar Bonavena prize fight at Madison Square Garden.* Following the fight, Simms reminded Jermain about the half kilo and Jermain told him he would take care of it.

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*A photograph taken at the prize fight depicts Jermain, Ramos, Morris and co-conspirator Harold McSpadden seated in one row and behind them Simms and co-conspirator Eugene Brown (GX 22).

Jermain and Ramos then departed and went to Diane's Bar in Manhattan where they met Capra, Guarino and Dellacava who also had been to the fight. An order was placed with Capra and Guarino for the half kilo, and Jermain made arrangements to pick it up from Dellacava. Simms was arrested on December 8, 1970 at Detroit Metropolitan Airport with the half kilo of heroin (Tr. 299-302; 1042-46; 1113-15, 1568-72).

Harris expressed his appreciation to Jermain and Ramos for their supply of high quality narcotics by giving each a new Cadillac (Tr. 265-69). More significantly, however, he introduced them to Alan Morris during the summer of 1970, who was to purchase substantial quantities of narcotics from Jermain and Ramos in the future.

5. The Morris Transactions

Jermain and Ramos met Morris for the first time at Hobie's Steak House in New York City. At this meeting Jermain and Ramos offered to supply Morris with pure heroin and cocaine, but insisted that the money for the drugs be paid in advance. After dinner Morris gave his telephone number to Ramos and left (Tr. 278-81).

Following this meeting Jermain and Ramos went to the Havemeyer Club where they informed Capra, Guarino and Dellacava that Harris had introduced them to a "heavy mover." Guarino then instructed Jermain and Ramos to "check him out" (Tr. 281).

Consequently, several days later Jermain and Ramos went to Detroit and visited Morris. At that time it was agreed that Morris would initially buy two kilos of heroin which would be delivered to him at LaGuardia Airport by Ramos and Jermain upon payment of the purchase price. (Tr. 282-83).

Jermain and Ramos returned to New York and told Capra that they had "checked out" Morris to their satisfac-

tion and that they needed two kilos of heroin for him in a few days. Several days later Morris and an associate flew to New York City, met Jermain and Ramos at LaGuardia Airport and exchanged suitcases—one containing two kilos of heroin, the other $48,000. Jermain and Ramos then went to Ramos' apartment in the Bronx, divided $8,000 between them and later gave the balance—$40,000—to Capra and Guarino in payment for the heroin (Tr. 284-86).

Pleased with the excellent quality of the heroin, Morris asked to see Jermain and Ramos again. Consequently, Ramos flew to Detroit where Morris ordered two additional kilos of heroin. Ramos returned to New York City with $48,000, kept out $8,000 for himself and Jermain and gave the balance to Capra and Guarino at the club. A few days later, in the early part of August, 1970, Morris came to New York to pick up the two kilos (Count Two). Since Jermain was busy with his new house on Long Island, he brought the two kilos to Ramos for delivery to Morris. Ramos delivered the two kilos to Morris in the Bronx (Tr. 286-91).

Following Simms' arrest in December 1970, Jermain and Ramos became exceptionally cautious in their illicit activities, and limited their contacts to customers in cities outside New York. In February, 1971 Ramos received a letter from Morris in which Morris requested a meeting in Florida. When Ramos and Jermain arrived in Miami, they were picked up by Morris who was driving a Cadillac with Michigan license plates. Morris then drove them, under surveillance of federal agents, to the Sheraton Beach Hotel where Ramos registered as Peter Martalerro and Jermain as Mr. Frank, aliases they commonly used when travelling (Tr. 305-06, Tr. 1474-78, 1495-98; GX 76, 77).

Jermain and Ramos remained in Miami with Morris for several days. During this visit Morris placed an order for nine kilos of heroin and one kilo of cocaine. Morris offered

to pay for six kilos of heroin and the one kilo of cocaine in advance and requested that the remaining three kilos of heroin be given to him on consignment. Ramos and Jermain told Morris that they were sure they could arrange for six kilos of heroin, but doubted that they could supply the additional three kilos of heroin on consignment.

In any event it was agreed that Ramos and Jermain would meet Morris in Cleveland at the Sheraton Inn where payment for the drugs would be made in advance of shipment (Tr. 319-22).

When Jermain and Ramos returned to New York, they went to the Havemeyer Club and told Capra and Guarino about the meeting in Miami. Capra immediately responded that he would not permit any heroin to be sold to Morris on consignment and insisted that Morris pay in advance for any heroin purchased. Capra further stated that the one kilo of cocaine also was "out of the question" (Tr. 322).

In the beginning of March, 1971, Jermain and Ramos flew to Cleveland to obtain payment for the six kilos of heroin which Morris had ordered. They registered at the Sheraton Hotel under their assumed names. That evening Morris entered Ramos' room, left a suitcase with Ramos, and departed. The suitcase contained somewhere between $125,000 and $150,000 in cash. Jermain and Ramos then returned to New York, met with Capra and Guarino and told them about the meeting in Cleveland and the receipt of the money. Ramos further stated that he had left the money at his sister's house where it could be picked up. Guarino then explained that they had decided to change the method of delivery of narcotics for security reasons. Guarino stated that he and Capra had decided that someone would fly with the six kilos in a suitcase to Detroit and leave it in the baggage room of the airport. The courier would then mail the claim check to Morris. In this way there was no possibility that anyone would be set up in

Detroit, since Morris would be unaware that the narcotics were available until the claim check was received. A courier was ultimately selected, and after Capra instructed Dellacava to make sure that he placed the six kilos in a new, sturdy suitcase, the heroin was delivered to Detroit (Tr. 322-34).

In the beginning of May, 1971 Jermain and Ramos again flew to Cleveland to obtain from Morris the balance remaining on the six kilos of heroin, which amounted to approximately $60,000, and to discuss a further shipment. Shortly after they arrived at Morris' hotel room, Jermain, Ramos, Morris and the latter's wife were all placed under arrest by federal narcotic agents. Approximately $60,000, found in a suitcase in the room, was seized. Ramos, upon his release from jail, returned to New York City and told Capra and Guarino about the arrest and seizure in Cleveland. Since Ramos was on federal parole at the time and faced a violation of his parole for the Cleveland arrest, Capra and Guarino advised Ramos to "stay low" for a while. Accordingly, Ramos and his family went to Monroe, New York in June 1971 and remained there through the summer of 1971 (Tr. 339-49).

Shortly after Ramos moved to Monroe, he and Jermain agreed to contact Morris to collect the balance due them which had been seized in Cleveland. Since neither of them wanted to carry the money because of their recent arrest, they recruited Rocco Sassone, a friend of the Ramos family, to act as the courier.* Jermain and Sassone flew to Detroit shortly thereafter and collected $35,000 in cash from Morris. Sometime later Ramos and Sassone went to Detroit and collected the balance (Tr. 349-58, 1374-83).

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* Sassone testified as a Government witness at trial.

6. The seizure of 6½ kilos of narcotics in Toledo and the arrests of Morris and Ramos

During this meeting in Detroit, Morris placed another order with Ramos for nine kilos of heroin and one kilo of cocaine. Morris again offered to pay in advance for six kilos of heroin, but requested that three kilos be sold to him on consignment. After returning to New York, Ramos went to Capra's house in New Rochelle where he reported Morris' latest order. Ramos also emphasized that Morris needed the kilo of cocaine this time. Capra stated that they would have no problem with the heroin, but that he would not permit any of it to be sold on consignment. Ramos later communicated the terms of the proposed sale to Morris by letter (Tr. 355-59).

In September, 1971, Morris telephoned Ramos at Monroe, advised Ramos that he would be coming to New York and asked to be picked up at the airport. Ramos, after picking up Rocco Sassone, met Morris and his associate, Willie Middlebrook, at John F. Kennedy Airport. The four of them then proceeded to the Lincoln Square Motor Inn on 66th Street in Manhattan. Ramos, Morris and Middlebrook went to a room while Sassone parked the car. Inside the room Morris handed Ramos a suitcase containing $145,00 to $150,000 in cash. Ramos then told Morris that the delivery would be made in the same manner as the last shipment. A courier would go to Detroit with the narcotics in a suitcase, check the bag and then mail the claim check to Willie Middlebrook. Before departing, Ramos telephoned Capra from the room and told him that everything was "all right" and that he would see him in the morning (Tr. 370-75).*

The following morning Ramos went to Capra's home with the money he had received from Morris. The maid told him that Capra was at his country club playing golf.

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* Telephone toll records were introduced which indicated a call was made from the motel to Capra's house in New Rochelle at this time. These records also reflected numerous telephone calls among the defendants (GX 134, 134A).

Ramos went to the Lake Isle Country Club in Westchester County where he met Capra as the latter was about to tee off on the first hole. Capra and Ramos went to the parking lot, took the suitcase containing the money from Ramos' car and placed it in the trunk of Capra's 1972 Mark IV Lincoln Continental (Tr. 375-76).*

In early October, 1971, Capra, Guarino, Dellacava, Jermain and Ramos met at Diane's Bar, 2034 Second Avenue in Manhattan, to discuss the shipment of the narcotics to Detroit. Since the previous courier had been arrested in the interim, Dellacava agreed to find another person to take the shipment to Detroit. At that point Capra made some computations on a small sheet of paper and concluded that Morris still owed $38,000 to Ramos and Jermain (Tr. 437; GX 21). Approximately one week later Ramos was informed by Jermain at Diane's Bar that the suitcase had been delivered by a courier to Toledo, Ohio, because there were no trains going from New York to Detroit. Jermain further related that the claim check had been mailed to Middlebrook in Detroit (T. 433-44).

On October 20, 1971 at 11:10 A.M. a train arrived at the Penn Central Railroad Terminal in Toledo, Ohio from New York City. A few minutes later a man approached the baggage room of the terminal and placed a suitcase on the counter. Mr. Milton Julert, the baggage agent, requested that the suitcase be checked in a locker in the railroad station because it would be safer there. The man insisted, however, that it be left in the baggage room, paid $.50 and departed promising to return "in a day or two" (Tr. 1726-28).

A few minutes later at approximately 11:20 A.M. a man approached the ticket office in the terminal and asked

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* At this time Guarino was driving a Lincoln Continental and Jermain a Mercedes. In addition, Capra, Guarino and Jermain each lived in large, lavishly decorated houses. For example, Jermain spent $12,000 to $14,000 for landscaping alone. Ramos testified, however, that none of the three held a job (Tr. 291-93, 379-83).

Charles Sibold, the ticket agent, for "a dollars worth of small change." The man then went to a telephone booth, made a call, returned and stated to Sibold that his sick uncle had just passed away and that he had to return to New York immediately to make funeral arrangements. Sibold first called the airport to find out when the next flight was scheduled for New York. He next asked the man his name so he could call a cab to pick him up. He replied "Messina" (Tr. 1916-18). A cab then arrived and "Messina" departed for the airport (Tr. 2356-57).

The suitcase remained unclaimed for several days. Julert became worried because the bag was not in a locked area. Furthermore, since Messina appeared somewhat nervous when he left the bag, Julert also wondered if he was "one of those crackpots dropping a bomb off . . . (Tr. 1728-30). On October 28, Sibold, assisted by Albert Blevins, police captain employed by the Penn Central Railroad, and several Toledo police officers, opened the suitcase. Inside were approximately five and one-half kilos of heroin and one kilo of cocaine (Tr. 1738-39, 1744-51).

Meanwhile, Jermain and Ramos, unaware of the seizure in Toledo, attempted unsuccessfully on several occasions to telephone Morris in Detroit. Finally, Ramos received a message to call the Hotel Statler in Detroit where Morris was registered under the name Alan Schwartz. He telephoned and spoke to Willie Middlebrook who immediately asked why he had not received the claim check in the mail. Ramos responded that it had been mailed to Middlebrook's house (Tr. 444-47).

On October 31, 1971 Mickey Dehook, a detective with the Toledo Police Department, was assigned in an undercover capacity as a baggage agent at the terminal. At approximately 8:50 A.M. Willie Middlebrook approached the baggage claim area and presented a claim check for the suitcase. Dehook then handed Middlebrook the suitcase, which now contained in place of the narcotics several telephone

directories and large dry cell batteries. Middlebrook, suitcase in hand, joined Morris near the entrance to the railroad terminal where they were both placed under arrest together with one Harold McSpadden who was waiting for them in Morris' Cadillac parked nearby. Morris had on his person $6,000 in cash. In addition, an envelope addressed to Willie Middlebrook was found on Morris (GX 21B). Inside was the note containing Capra's computation made earlier at Diane's Bar on the balance still owed by Morris (GX 21). On the reverse side of the paper, the following writing appeared: "Go to Penn R. R. Toledo, Ohio. Check Room open in daytime only" (GX 21) (Tr. 1796-98, 1808-14).*

Several days later Messrs. Julert and Sibold as well as the cab driver, Miss Ruthella Raudebush, who drove Messina to the airport, identified Joaquin Ramos from a series of photographs as the New York man who was present at the Toledo station on October 20, 1971. Consequently, on November 10, Ramos was placed under arrest in New York City. He was later extradited to Ohio where he, Morris, Middlebrook and McSpadden were subsequently convicted for violations of the narcotics laws of Ohio.**

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* A handwriting analyst testified that the writing on the envelope and the directions to go to the check room were in the handwriting of co-defendant Joseph Messina (Tr. 2698).

** Ramos, while admitting at trial his participation in the conspiracy to send the narcotics to Toledo, denied that he personally carried the suitcase to Toledo in October 20, 1971. His testimony was supported by the handwriting analysis of the envelope and note contained therein found on Morris which was that of Joseph Messina, a co-defendant. In addition, Miss Raudebush at trial was unable to identify Ramos from a photograph in which he was seated with others with his face full flush to the camera (Tr. 2355; GX 15). Moreover, Messrs. Sibold and Julert testified that the man they spoke to on October 20 parted his hair on the right side of his head (Tr. 1921-22, 2950-51). Detective Nauwens, who arrested Ramos on November 10, 1971 testified that his hair was parted on the left side of his head (Tr. 2963-64).

7. The wiretap at Diane's Bar and related surveillance

In the late fall of 1971 Diane's Bar,* 2034 Second Avenue, New York, New York became the focus of a narcotics investigation conducted by the New York City Police Department. On December 8, 1971 New York State Supreme Court Justice Harold Birns issued an eavesdropping warrant authorizing the interception of conversations of one Joseph Della Valle pertaining to narcotics over a public telephone in the bar. On January 6, 1972 Justice Birns extended the order for an additional thirty days and amended it to authorize the interception of narcotics related conversations of defendant Dellacava.

Pursuant to these authorizations, electronic surveillance was maintained from December 9, 1971 through February 3, 1972 (Tr. 2164-65). The Government introduced 19 of these intercepted conversations at trial. Together with the evidence obtained by visual surveillance accompanying the wiretap, these conversations reveal how the conspiracy functioned and the central roles which Capra, Guarino and Dellacava played in the illicit scheme.

On January 10, 1972 co-defendant Jack Brown telephoned Dellacava and suggested that they get together for a game of "chess." Dellacava asked if he should bring the "big fellow" to which Brown responded, "Yeah, bring a hogie sandwich" (Tr. 2170-71; GX 75A). Following the interception of this conversation, Dellacava was observed leaving Diane's Bar and driving to the Bronx. Surveillance was lost in the vicinity of the Havemeyer Club (Tr. 2217-18). On February 2, 1972 at 9:05 p.m., Brown telephoned Dellacava and suggested another game of "chess" for the following evening. On this occasion Brown requested Dellacava to bring "my little friend" as opposed

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* Capra, Guarino and Dellacava claimed to be the undisclosed owners of Diane's Bar during this period (JA 136-37).

to a "big fellow" and added that he would provide the "hors d'oeuvres and things" (Tr. 2218; GX 75B).

At 8:40 P.M., on the following evening, February 3, 1972, before the scheduled "chess" game, a conversation between Guarino and Dellacava was intercepted. Guarino asked if Dellacava had seen "our friend . . . Jack". Dellacava replied that Brown was some place else and that he did not have the telephone number. Guarino then gave Dellacava a number where he could reach Brown. Before hanging up Dellacava told Guarino to call back in 15 minutes (Tr. 2220; GX 75C). Dellacava immediately called the number given to him by Guarino and spoke to Brown's wife who told him that Brown was already at the place (Tr. 2221; GX 75D). Dellacava then called Guarino again who told him that he would be at the Rainbow Grill in Manhattan and would meet him later that evening at 10:30 P.M. Dellacava suggested that the meeting take place on 5th Avenue near the statue at Rockefeller Center (Tr. 2222-23; GX 75E).

A few minutes after this conversation, Dellacava left Diane's Bar and drove at a high rate of speed over the George Washington Bridge to New Jersey where he managed to lose surveillance (Tr. 2223-24). Later that evening, however, at approximately 10:00 P.M. Dellacava drove to Brown's residence at 180 West End Avenue in Manhattan, for the scheduled "chess game. He entered the building and went to Brown's apartment where he remained for approximately five or six minutes. When he departed he carried a small black toiletry case which he placed in the trunk of his automobile and left the area (Tr. 2309-11, 2317-20). Dellacava drove to the prearranged meeting place at Rockefeller Center where he met Guarino. At this point both men were placed under arrest. $11,500 in cash was found in the black toilet case (Tr. 2228).

The language of the intercepted conversations was frequently coded and guarded. Thus, for example, there was

a series of intercepted conversations between Dellacava and co-conspirator Vino Green in which they discussed the availability of narcotics but which contained only references to their "health". When narcotics were unavailable, the parties announced they were "sick", but when delivery was possible, the illness promptly disappeared. Two of these conversations occurred within an hour of each other on December 11, 1971. In the first, at 7:16 P.M., Green called Dellacava and asked how he was feeling. Dellacava responded "not so good" and stated that "we gotta wait til Monday" (GX 75F). An hour later Green called again and the following conversation took place:

Dellacava: Hello.
Green: How you feel?
Dellacava: Hah, hah, Sick, Sick, Sick really.
Green: Me and you both.
Dellacava: My god, alright try and keep in touch with me, hah pal.
Green: Bye.
Dellacava: Okay (GX 75G).

Finally, on January 7, 1972 both Dellacava and Green have fully recovered. They are both feeling "fine", and arranged to meet later that night (GX 75I).

Another series of conversations was intercepted in which the parties expressed unusual concern about their "Christmas presents." On December 21, 1971 at 8:27 P.M. Brown called Dellacava and after they noted how "lousy" each felt and how "sick" Dellacava's cousin was, Dellacava stated he would see Brown on Thursday to bring him his Christmas present (GX 75-0).

On Thursday, December 23 Dellacava called Capra at 6:30 P.M. and asked: "Do I have to bring anybody anything? You know, like a present for them people?" Capra replied in the affirmative and told him to pick it up (Tr.

2257; GX 75P). Following this conversation Dellacava drove to a social club in the Bronx, which he entered. He left the club a few moments later with a set of car keys which he used to open the trunk of a Lincoln Continental often driven by Capra. Dellacava removed a brown paper package and placed it in his own vehicle. He eventually reentered his automobile and drove from the Bronx to Manhattan at a high rate of speed where he eluded surveillance in the vicinity of West 79th Street near Jack Brown's apartment (Tr. 2252-55, 2964).
gifts (Tr. 2256; GX 75Q). At 8:25 P.M. that same evening

On December 29, 1971 at 6:50 P.M., Brown called Dellacava and asked him to tell everybody that he liked his gifts (Tr. 2256; GX 75Q). At 8:25 P.M. that same evening Capra telephoned Dellacava and the following conversation ensued:

Capra: Did you to see a, what his name? Our friend.
Dellacava: Yeah, yesterday.
Capra: He didn't have no Christmas present?
Dellacava: Nah.
Capra: Didn't you say he had a present for us? Didn't you tell me that?
Dellacava: I said that to you?
Capra: Yeah (Tr. 2256; GX 75R).

Finally, at 10:30 P.M. that same evening, Dellacava telephoned Brown and reminded him that he had previously indicated that he "might give them fellows a Christmas present you know." Dellacava then requested that if possible, the present be delivered that same night (Tr. 2256; GX 75S).

8. Herbert Sperling Joins Capra and Guarino

On September 23, 1966 Herbert Sperling was released from federal prison after serving a ten year sentence for violation of the federal narcotics laws (Tr. 3365). It was not long thereafter that Guarino assisted Sperling in reentering the narcotics business. In April, 1971 Capra and

Ramos met Sperling at a clothing store on Broadway where Sperling told Capra that he knew some people who had received a shipment of narcotics of uncertain quality. Capra recommended that Sperling take the "load" and that if the quality of the drugs was poor, the narcotics could be returned to the seller (Tr. 335-36). During 1971 and 1972 Sperling maintained a close association with Capra and Guarino. Photographs taken during this period in the vicinity of Ballantine's barbershop, 7th Avenue and 54th Street in Manhattan, captured several meetings among the conspirators (Tr. 2408, 2659-71; 2746-53). The dates of these meetings and the names of the conspirators depicted in the photographs are set forth below:

Dates	*Conspirators*	*Gov't. Ex. No.*
July , 1971	Guarino and Sperling	115
July , 1971	Guarino and Sperling	116
Sept. 27, 1972	Capra and Guarino	122
Oct. 4, 1972	Guarino and Sperling	117
Oct. 4, 1972	Guarino and Spada	119
Oct. 23, 1972	Guarino and Sperling	123, 124
Oct. 30, 1972	Capra and Sperling	125, 126

By 1973 Sperling had become a member of the executive group within the conspiratorial organization. In mid-March 1973 Sperling and co-conspirator Joseph Conforti, one of Sperling's narcotics workers, met with defendant John Caruso at the Stage Delicatessen on Seventh Avenue and 54th Street in Manhattan. Sperling introduced Conforti to Caruso and explained that thenceforth Conforti would be working with Caruso. Sperling then left the restaurant and met Guarino and Capra outside. Meanwhile Caruso explained to Conforti that he mixed narcotics for Capra and Guarino and that he would be moving narcotics out of an apartment which narcotics Conforti would eventually receive for storage (Tr. 2409-13).

Following this conversation Conforti and Caruso left the restaurant. Caruso joined Capra, Guarino and Sperling inside a nearby cigar store. Conforti remained outside where he conferred with Jack Spada, a co-conspirator, who also mixed narcotics for Sperling. Spada further explained that Caruso worked for Capra and Guarino and that Conforti should take instructions from him in the future. Spada also mentioned that Guarino was the "heavy man" who had "the connections in bringing in narcotics" and that Capra managed the business (Tr. 2414-15, 2419-20).

Conforti then rejoined Capra, Guarino, Sperling and Caruso in the cigar store. Capra instructed Caruso to take the "mix and stuff" out of the apartment and leave everything else. He then told Conforti to listen to Caruso and always make sure he was not followed. Several days later Caruso met Conforti and gave him two suitcases and a box for storage in his basement. Inside the suitcase were approximately 70 pounds of lactose and mannite, as well as scales, masks and other paraphernalia for mixing narcotics (Tr. 2420-23).

The following day Conforti went to Sperling's house in Bellmore, Long Island, and asked Sperling whether he should consolidate the mannite belonging to Capra and Guarino with Sperling's. Sperling told him that he saw no reason why Conforti should not put the mannite and lactose with his supply of diluents as "we are all one big family." Sperling suggested, however, that Conforti wait until he could check and make sure. The following day Capra told Sperling that all the "stuff" could be consolidated (Tr. 2423-26).

The next day Sperling telephoned Conforti and requested him to meet Sperling at 54th and Seventh Avenue. Conforti met Sperling, Guarino and Capra in the cigar store. As he entered he heard Guarino telling Sperling that "we need the money to get this deal going." Sperling then requested Conforti to go to Sperling's home and pick up $30,000 which was in a bag in his wife's closet. Conforti went to Sperling's home where he located a bag containing

$40,000 in the closet. He removed three stacks of currency containing $30,000, which he placed in a bag, and returned with the money to Sperling, Capra and Guarino. As he entered the cigar store, Guarino told Sperling that if Conforti were going to carry money, to make sure that he put it in his pocket or underneath his jacket as opposed to carrying it in the open (Tr. 2427-29).

On April 7, 1973, Sperling telephoned Conforti and told him to obtain the "equipment". Conforti left carrying a green suitcase containing mixing paraphernalia and testing equipment. He went to the Bar Harbor Hotel in Massapequa, Long Island, left the equipment in a room and went to Sperling's house. When he arrived Sperling told him "things" would be picking up because he was now a partner of Capra and Guarino. He also informed Conforti that he could expect to earn between $80,000 and $85,000 a year as opposed to approximately $4,000 which Conforti had been earning working for Sperling alone.

Conforti then returned to the motel and waited for several hours until Caruso arrived carrying a brown A & P bag containing eight kilos of heroin in ½ kilo plastic bags. Spada arrived 20 minutes later at which time they performed two tests on the heroin from which they ascertained that it was pure. Caruso then stated that he intended to call Capra and tell him "everything is all right." It was decided, however, to have Spada call Sperling who would pass the word on to Capra. After the call was placed, they mixed two and a half kilos of pure heroin with manita, which yielded six or seven kilos of diluted heroin. A heat sealer was then used to seal the diluted heroin in half kilo bags. Caruso and Spada departed to make the deliveries and Conforti remained behind to clean up the room (Tr. 2429-38).

On April 10, 1973 Conforti received another telephone call from Sperling directing him to "come out with the equipment." Conforti registered at the Gateway Motel in

Merrick, Long Island, left the equipment and mix in the motel room and went to Sperling's house. Conforti was instructed by Caruso, who was there when he arrived, to purchase two flight bags and meet him at the motel later. Conforti purchased the two bags and several hours later met both Caruso and Spada at the motel. They brought with them two and a half kilos of pure heroin which they had tested previously on April 7. They proceeded to mix and package the two and a half kilos of pure heroin which were then placed in two flight bags which Caruso and Spada took with them when they left. Conforti again stayed behind and cleaned up (Tr. 2438-44).

On Friday, April 13, 1973, Sperling telephoned Conforti again and directed him to "bring the stuff. . . ." Conforti went directly to Sperling's house. When he arrived Guarino and Sperling were discussing their prospects about a good year and "something about a connection being made". Conforti left and registered at the Bar Harbor Motel. Several hours later Caruso arrived with approximately two kilos of heroin. Again they mixed and packaged the heroin and placed it in a brown bag which Caruso took with him when he left. Conforti stayed behind and cleaned the room (Tr. 2444-50).*

9. The arrests of April 14, 1973

In the early morning hours of April 14 Conforti was arrested pursuant to a federal bench warrant. Twenty pounds of mannitol and lactose wrapped in plastic bags and a green suitcase containing narcotics paraphernalia were found in the trunk of his automobile (Tr. 2450-72).**

* Dust samples collected by a government chemist on May 15, 1973 from rooms at the Bar Harbor Motel which Conforti used were found to contain traces of heroin (Tr. 2888-90; GX 80, 82, 132A-D, 133A-C).

** The paraphernalia include mineral oil, a heater, test tubes, eye droppers, masks, plastic bags, a thermometer, a scale, spoons, rubber gloves, a sealing machine and a can of deodorant spray used to mask the odor produced by heroin.

Bench warrants issued for the arrests of Capra, Guarino, Dellacava and Sperling also were executed early that morning.

Dellacava was arrested at 86th Street and Lexington Avenue in Manhattan while driving his car. Inside the trunk of the automobile were a brown gym bag containing $13,999 in currency and a machine for sealing plastic bags. Subsequent laboratory tests revealed traces of heroin in the gym bag (Tr. 2770-74, 2885-88; GX 127, 128, 129, 130A, 131).

The Defense Case

None of the defendants testified in his own behalf. The defense, however, presented four witnesses: Samir Sulayman, Dr. Jerome Levin, Herbert Sperling and Alex Metro.

Sulayman was called by Capra, Guarino and Dellacava in an attempt to refute the testimony of Dr. S. C. Chen, Professor of Pathology at the Medical College of Ohio in Toledo, who, on behalf of the Toledo Police Department, had analyzed the narcotics which were discovered in the Central Union Railroad Terminal on October 28, 1971. During the Government's direct case Dr. Chen testified that he had performed his analysis of the narcotics alone, at night, after the laboratory was closed for regular business, because of the sensitivity of the assignment. On November 9, 1971 he concluded that the suitcase contained approximately 5½ kilos of heroin and one kilo of cocaine (Tr. 1937-45). Sulayman, a laboratory technician formerly employed by Dr. Chen, testified that he, rather than Dr. Chen, performed the tests on the substances found in the suitcase. Sulayman stated that he performed these tests at both the Medical College laboratory and the near-by pharmacology laboratory and that the results of his tests were inconclusive. On cross-examination he testified that his results were inconclusive because a recorder device for the testing instrument at the pharmacology laboratory was unavailable

(Tr. 3210). He further testified that certain charts utilized by Dr. Chen in his analysis were not genuine (Tr. 3116-91). Dr. Jerome Levin, an Assistant Professor in the Department of Pharmacology at the Medical College of Ohio, testified that on two occasions between 1970 and 1972, Sulayman came to his laboratory and used a certain testing instrument (Tr. 3031-33).

Capra and Guarino also called Herbert Sperling as a witness. Sperling, twice convicted of violating the federal narcotics laws and presently serving a life sentence for engaging in a continuing criminal enterprise in narcotics in violation of 21 U.S.C. §848, testified that he had been a bookmaker who had never been engaged in narcotic trafficking. Moreover, he further stated that Capra and Guarino were "shylocks" or loan sharks, not narcotic dealers, and that he had borrowed money from them when he did poorly in his bookmaking operation. Sperling stated that he and Conforti had been partners in a pizza parlor, but that he terminated the relationship because Conforti had a bad temper and once had threatened to chop Sperling's fingers off (Tr. 3307-29).* Sperling admitted that he had lied about his use of cocaine following his arrest on April 14, 1973 (Tr. 3400, 3417-18).

Co-conspirator Alex Metro, called as a witness by Capra and Jermain, also testified that he had been a gambler and denied that he had ever been a partner of Joaquin Ramos in the narcotics business. He further stated that Capra was a "shylock" from whom he had borrowed money at two percent interest per week and that Capra was not engaged in

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* Sperling was arrested on April 14, 1973 driving a Mercedes-Benz. A dollar bill with cocaine wrapped inside was found on his person. In his car were found two loaded guns, a hatchet, a pick handle and a pair of surgical gloves (Tr. 3400-01). Sperling's address book, seized at the time of his arrest, contained a reference to Dellacava and the telephone number of Diane's Bar (Tr. 3391-92).

narcotics trafficking. On cross-examination Metro, who was serving a 20-year prison sentence for violation of the federal narcotics laws, admitted to three previous narcotics convictions. Metro was asked whether he had dealt in narcotics in 1969, as testified to by Ramos. Outside the presence of the jury, he asserted his Fifth Amendment privilege. At the request of counsel for Jermain, he was withdrawn as a witness and his testimony was stricken (Tr. 3587-3612).

The Government's Rebuttal Case

In rebuttal, the Government called Robert Henderson, a chemist employed by the Drug Enforcement Administration and Dr. Jerome Levin. Henderson testified that he had tested the powder found in the suitcase in Toledo and reaffirmed Dr. Chen's conclusion that it was heroin and cocaine (Tr. 3469-72). Dr. Levin testified that the recorder device for the testing instrument used by Sulayman, which would have enabled him to obtain accurate results, was available and in working order in the pharmacology lab, but that Sulayman had never requested it (Tr. 3560-66).

ARGUMENT

POINT I

The inspection and seizure of the narcotics found in the suitcase in Toledo did not violate the Fourth Amendment rights of Capra, Guarino and Dellacava.

Three of the defendants—Capra, Guarino and Dellavaca—moved before trial to suppress the 6½ kilograms of narcotics found in a suitcase which was opened on October 28, 1971 in the baggage room of the Central Union Railroad Terminal in Toledo, Ohio. Each of these defendants testified at the suppression hearing under the protection of

Simmons v. *United States,* 390 U.S. 377 (1968) and swore that they were the joint owners of the suitcase and its contents. The three explained that they were partners in a variety of enterprises and that in the early fall of 1971 they, together with Ramos, formed a partnership to sell the heroin and cocaine later seized in Toledo.* Ramos allegedly was the only partner who knew the identity of the customer, and therefore he was designated to arrange the delivery of the narcotics to its destination.

Dellacava testified that he removed approximately $30 from a "kitty" maintained by the partners and purchased a small black Samsonite suitcase at a department store in the Bronx. Thereafter he placed the narcotics in the suitcase, locked it securely and handed it to Ramos in the Bronx, who, in turn, gave Dellacava approximately $150,000 allegedly representing a down payment from the "unknown" customer. Delivery was to be made by courier to Toledo where the suitcase would be picked up by the purchaser.

On October 20, 1971, a man appeared at the baggage room of the Central Union Raidroad Terminal in Toledo, Ohio and asked to check a small Samsonite suitcase for a day or two. When Milton Julert, the baggage agent, suggested that he leave it in a locker where it would be safer, the man, who appeared tense, demanded that the suitcase be checked in the bagagge room. Julert accepted the bag and gave the man a claim check, receiving fifty cents for a 1 day storage charge (JA 1330-1333).

During October, 1971 only two trains passed through the Toledo terminal each day. The baggage room check-in facilities were generally used by those placing luggage on or receiving it from one of those two trains. In the six-

* Judge Frankel, in his memorandum opinion denying the motion, aptly observed that this performance served in a vivid way to test the possible limits of the exclusionary rule (JA 190-207 at 192).

month period prior to October, 1971, no one had checked anything in the baggage room for any other purpose.

Julert placed the suitcase in a caged area in the rear of the baggage room. In lifting it he noticed that it was heavier than usual and that the contents produced what appeared to be a "rustling" sound like cellophane or plastic. For a fleeting moment, he considered that the bag might contain a bomb. Since he was scheduled to be off the following two days, Julert notified the relief baggage agent, Charles Sibold, that a suitcase had been checked and that an additional charge should be collected if it were not picked up the following day (JA 1334-1336).

When Julert returned to work on October 23rd, he noticed that the suitcase was still in the baggage area. That day Sibold lifted the suitcase and shook it, noting that it was heavier than it would have been had it contained clothing, and that a "swishing" sound emanated from within * (JA 1435-1436).

On October 26th Sibold expressed concern to Julert about the suspicious circumstances surrounding the suitcase, which continued to remain in the baggage room unclaimed, and suggested that the Railroad police be contacted. Julert was concerned about the security of the suitcase. Sibold, on the other hand, was worried that it might contain explosives (JA 1441-1442).

On October 27th, Sibold contacted Captain Albert Blevins of the Penn Central Police and told him that he wished to have the bag opened, since it had been left under suspicious circumstances and had remained unclaimed for over a week (JA 1438).

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* At one point Sibold placed the suitcase on a scale in the baggage area and found that it weiged approximately 24 pounds.

Under the policy of the Penn Central Railroad, the opening of a suitcase or other article entrusted to the carrier is solely a decision for the baggage agent, if he believes the suitcase or article is suspicious or possibly detrimental to the company (JA 1409). However, a Penn Central police officer is required to be present to act as a witness (JA 1388). Consequently, Sibold, accompanied by Blevins, went to the baggage room where Sibold attempted unsuccessfully to open the suitcase with some Samsonite keys which had been collected over the years (JA 1387-1390). By this time, Blevins too had become concerned about the contents of the suitcase, having been present on a prior occasion when the makings of pipe bombs were discovered in a parcel stored in the Penn Central Station in Cleveland (JA 1400-1401). That afternoon Blevins telephoned his friend, Detective George Ryan of the Toledo Police Department, and requested assistance in unlocking the suitcase. He asked Ryan if he knew where to locate keys for a Samsonite suitcase, or, in the alternative, if he knew someone who could open one (JA 1390-1392).

Unable to locate any Samsonite keys, Ryan contacted Officer Gerry Bedal who worked in the Toledo Police Armory and who had some experience in opening locks. On October 28th, Ryan and Bedal went to the terminal. En route they unexpectedly met Detective Beavers, who accompanied them (JA 1479-1482).

Upon arriving, they went to Blevins' office and proceeded with him to the baggage area. Bedal first attempted to turn the two locks on the suitcase with a screwdriver and a pick-like instrument. Unsuccessful in this effort, he finally unlatched the two locks with paper clips provided by Blevins and Sibold. Sibold was then told that since the suitcase was Penn Central property, it was his responsibility to open it (JA 1441). He placed the suitcase on the floor, and opened it. Exposed in plain view were twelve plastic bags together with some towels. Eleven of the bags con-

tained a white powder; the twelfth contained a crystalline substance and had the initial "C" marked on a piece of tape affixed to the bag. Beavers took the bag with the initial "C" on it, opened it and examined it. Suspecting that it might be cocaine, he telephoned the Metropolitan Drug Unit Office for a cocaine field test kit. Subsequent laboratory analysis showed that the plastic bags contained approximately 5½ kilos of heroin and 1 kilo of cocaine (JA 1392-1394, 1482-1484).

On October 31, 1971, Willie Middlebrook, appeared at the baggage area and presented the claim check that Julert had given to the man who had checked the suitcase on October 20th. The suitcase was given to Middlebrook by a police officer posing as the baggage agent.

Middlebrook left the baggage area with the suitcase and met defendant Alan Morris in the main concourse of the terminal. Both were arrested by the Toledo police (JA 1429-1431).

1. Standing

Both at the suppression hearing and on this appeal, the complaining defendants claim standing to suppress the suitcase and its contents on account of an alleged possessory interest in the narcotics seized. The basis for the claim that they still retained a possessory interest in the narcotics rests on the assertion that there was a balance due them on the sale. The record, however, belied that claim.

At the suppression hearing Capra testified that they were to receive approximately $24,000 for each kilo of heroin and $18,000 for the kilo of cocaine (JA 40-41). The suitcase was found to contain approximately 5.5 kilos of heroin and one kilo of cocaine. This quantity of narcotics, using the figures quoted by Capra, was thus to be sold for $150,000 by the defendants and that is precisely the amount

that they admittedly received before the drugs left New York (JA 17).*

In this respect, the defendants' testimony at the suppression hearing was entirely consistent with the evidence later presented at trial which revealed that Capra and Guarino, in this transaction and in many others, customarily demanded that payment for their narcotics be "up front", *i.e.*, in advance of shipment and delivery (see, *supra*, pp. 7, 11, 13).** The record fully supports the trial court's conclusion that standing to challenge the search, if it existed anywhere, resided in the purchaser rather than the suppliers.

In sum, as the trial court found, Capra, Guarino and Dellacava had been paid in full for their contraband and had no further interest of any kind either in the suitcase or its contents. See *United States* v. *Epstein*, 240 F. Supp. 80, 82 (S.D.N.Y. 1965). As Judge Frankel held:

> "It was entirely consistent with the Government's position before trial, still more clearly at trial, to show that the movants had possessed the narcotics as the indictment alleges, in the Southern District of New York, and that this possession ended when the suitcase was given in this District to a courier, well before the later search and seizure in Toledo" (JA 207).***

Even if the record supported the contention advanced by appellants that they retained an interest in the narcotics until the purchaser actually accepted the drugs, such an

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* Any amounts still owing (See GX 21) were for Jermain and Ramos (JA 206, n.6).

** The evidence at trial may be properly taken into account by this Court in weighing the correctness of the District Court's denial of the suppression moiton. *United States* v. *Canesio*, 470 F.2d 1224, 1226 (2d Cir. 1972).

*** See also *United States* v. *Cowan*, 396 F.2d 83, 86 (2d Cir. 1968).

interest would be "totally illegitimate" and hence insufficient to confer standing. *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973).

2. Private Search

The alternate ground upon which the motion to suppress was denied was the conclusion "that upon the particular facts of this case, as they unfolded in Toledo, there was no such invasion of privacy through the opening of the suitcase as to require suppression of the fearsome things the suitcase contained" (JA 194). The testimony adduced at the hearing indisputably established that the opening of the suitcase at the instigation of the baggage agent was neither a search to obtain evidence nor a search connected with the investigation of a crime, nor was it an "intrusion" initiated by law enforcement officers "with the specific intent of discovering evidence of a crime. . . ." *Cady* v. *Dombrowski,* 413 U.S. 433, 442 n. (1973). See also *Haerr* v. *United States,* 240 F.2d 533, 535 (5th Cir. 1957).

Here Charles Sibold, the baggage agent, wanted the suitcase opened because of the suspicious circumstances under which it had been left, its unusual weight, and his belief that its contents might be dangerous. He had every right and indeed a duty to open the bag and inspect its contents for the safety of his company, its property and personnel and the public,* as Judge Frankel ruled (at JA 199-200). The railroad's policy permitted opening for inspection by baggage agents of suitcases or other articles entrusted to it. They could do so only with a Penn Central police officer present to act as a witness to the inspection. This require-

* Because a common carrier has a general duty of care toward all the goods it transports, it also has the right to open and the duty to inspect a package which it suspects contains a dangerous device or substance which may damage other goods in the shipment or the vehicle carrying them. See cases cited in the opinion denying the motion to suppress at p. 11 (JA 200).

ment obviously was designed to protect both the baggage agent and the company from any future claim by the owner of the bag that something had been taken during the course of the inspection. Under these circumstances, the opening of the suitcase did not constitute a search forbidden by the Fourth Amendment, but was solely the venture of a private person, Mr. Sibold, acting on behalf and under the authority of his employer.*

More than fifty years ago the Supreme Court established the principle that the Fourth Amendment restricts only the sovereign. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921). The exclusionary rule is inapplicable to evidence obtained by private persons not acting at the direction of or on behalf of law enforcement agents, *e.g., United States* v. *Antonelli,* 434 F.2d 335 (2d Cir. 1970); *United States* v. *Goldberg,* 330 F.2d 30 (3d Cir.), *cert. denied,* 377 U.S. 953 (1964); *Watson* v. *United States,* 391 F.2d 927 (5th Cir.), *cert. denied,* 393 U.S. 985 (1968); *Barnes* v. *United States,* 373 F.2d 517 (5th Cir. 1967), because its purpose is to deter unconstitutional conduct by *law enforcement officers. Coolidge* v. *New Hampshire,* 403 U.S. 443, 487-488 (1971). Accordingly, where a private person conducts a "search," participation by the police in connection with that "search" will not transform it into governmental action subject to scrutiny under the Fourth Amendment so long as the private person, as here, acts for his own purposes and not at the direction or instigation of the police or for their benefit. *Blum* v. *United States,* 329 F.2d 49 (2d Cir.), *cert. denied,* 377 U.S. 993 (1964); *Wolf Low* v. *United States,* 391 F.2d 61 (9th Cir.), *cert. denied,* 393 U.S. 849 (1968); *United States* v. *Cangiano,* 464 F.2d 320 (2d Cir.

* The actions of Captain Blevins of the railroad police, who testified that only Sibold had authority to open the suitcase, were entirely directed towards assisting Sibold in the latter's request to have the suitcase opened. Captain Blevins did not order, direct or execute the opening of the suitcase. He was present when it was opened solely for the purpose of acting as a witness.

1972), *vacated on other grounds,* 413 U.S. 913 (1973); *United States* v. *DeBerry,* 487 F.2d 448, 449-450 (2d Cir. 1973). In *Cangiano* Judge Timbers distinguished *Corngold* v. *United States,* 367 F.2d 1 (9th Cir. 1966), upon which appellants place heavy reliance, by the fact that in that case federal agents who had been conducting an investigation requested that the package be opened. See also *United States* v. *Tripp,* 468 F.2d 569 (9th Cir. 1972), *cert. denied,* 410 U.S. 910 (1973); *Gold* v. *United States,* 378 F.2d 588 (9th Cir. 1967); *Clayton* v. *United States,* 413 F.2d 297 (9th Cir. 1969), *cert. denied,* 399 U.S. 911 (1970); *Romero* v. *United States,* 318 F.2d 530 (5th Cir.), *cert. denied,* 375 U.S. 946 (1963); *United States* v. *Burton,* 341 F. Supp. 302 (W.D. Mo. 1972), *aff'd,* 475 F.2d 469 (8th Cir. 1973); *United States* v. *Pryba,* 312 F. Supp. 466 (D.C. 1970); *United States* v. *Berger,* 355 F. Supp. 919 (W.D.N.Y. 1973).

Even if Sibold's actions were deemed a search for Fourth Amendment purposes, the Constitution does not prohibit all warrantless searches and seizures. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady* v. *Dombrowski,* 413 U.S. 433, 439 (1973). "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. . . ." *Cooper* v. *California,* 386 U.S. 58, 59 (1967). Here no one was investigating any crime and had no idea that a crime had been or was being committed. No investigation was in progress by the Toledo Police Department concerning any of the defendants in this case or anyone else. At most, Sibold and Blevins entertained a suspicion, based on little evidence but no little fear, that they were keeping in charge a suitcase that might blow up. The police were doing nothing more than assisting the railroad and unquestionably had a legal right to be where they were when the narcotics were unexpectedly discovered. It is a well-established exception to the requirement of a warrant that where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes

across an incriminating object that the evidence seized is admissible. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466 (1971). Cf. *Cady* v. *Dombrowski, supra,* at 447-448. Under the circumstances of this case, the plain view doctrine is fully applicable and authorized the admission of the evidence. See also *Harris* v. *United States,* 390 U.S. 234, 236 (1968).

POINT II

The evidence obtained from the wiretap at Diane's Bar was admissible.

Capra, Guarino and Dellacava contend that the evidence obtained from the wiretap of the telephone at Diane's Bar should have been suppressed. None of their arguments have merit.

1. The initial eavesdropping warrant was entirely lawful.

The principal attack on the legality of the initial eavesdropping warrant issued by New York State Supreme Court Justice Harold Birns on December 8, 1971 is that Detective George Eaton's supporting affidavit was perjurious. To the allegations of perjury, appellants add that Judge Frankel improperly denied them a hearing to prove their claim and likewise erred in refusing to issue a writ for a prisoner who allegedly could prove their theory. These contentions are meritless.

The application for the original wiretap order on the telephone at Diane's Bar contained abundant probable cause to warrant its issuance. Detective Eaton's affidavit of December 8, 1971 referred to a confidential informant whose identity was disclosed to Justice Birns. The informant was personally known to Eaton who had arrested him on a narcotics charge in April 1971. Between April

and December, 1971, information and cooperation supplied by this informant had resulted in five arrests for narcotics offenses and one conviction for possession of a loaded weapon as a felony. This alone was sufficient to establish the informant's previous reliability. See, e.g. *United States* v. *Perry,* 380 F.2d 356 (2d Cir.), *cert. denied,* 389 U.S. 943 (1967).

Eaton's affidavit also recited facts which unquestionably established the informant's credibility as well. The affidavit stated that the informant in the early part of April, 1971 met with Joseph Della Valle, his brother and another individual, that Joseph Della Valle then offered to sell heroin to the informant and that John Della Valle supplied the informant with two telephone numbers at which either Joseph or John Della Valle could be reached to discuss narcotics transactions. One of these numbers, 722-9595, was the telephone at Diane's Bar. The fact that the informant, at the time of his arrest by Eaton, had a telephone book with the notation "John & Joe 722-9595, 824-6406" served to confirm his story.

In addition, the affidavit described two telephone conversations on October 29, 1971 and on November 2, 1971 between the informant and a person he identified as Joseph Della Valle which Eaton personally overheard and which indisputably related to the sale of narcotics. The October 29th conversation was conducted on Telephone Number 722-9595.

Eaton further described that he personally observed Joseph Della Valle in the vicinity of Diane's Bar during October and November, 1971 with persons who had narcotics-related criminal records. The observations of Della Valle made by Detective McCrorie on October 4, 6, 12 and 13, viewed in light of the other information known about him, were further circumstances of Della Valle's participation in conspiratorial narcotics activity. All of these facts more than adequately established and corroborated the underlying basis of the informant's information. *United States* v. *Sultan,* 463 F.2d 1066 (2d Cir. 1972).

Finally, Eaton's affidavit specified in detail the reasons why normal investigative procedures had not yielded sufficient evidence to prosecute Della Valle successfully. These facts provided an ample basis upon which Justice Birns could reasonably have found that probable cause existed. *United States* v. *Tortorello,* 480 F.2d 764, 773-74 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); *United States* v. *Becker,* 334 F. Supp. 546 (S.D.N.Y. 1972), *aff'd,* 461 F.2d 230 (2d Cir. 1972); *United States* v. *Askins,* 351 F. Supp. 408 (D. Md. 1972).

Of all the attacks launched on the wiretap, the contention that Eaton's affidavit was perjurious is surely the most specious and contrived. In support of his motion to suppress the wiretap evidence, Guarino's attorney submitted an affidavit alleging that he had been "informed" that Joseph Della Valle denied having telephone conversations with the informant on October 29, and November 2, 1971 as reported in Eaton's affidavit of December 8, 1971. This hearsay allegation was, of course, insufficient to warrant a hearing on the alleged perjury.

When appellants recognized the deficiency of their presentation, they sought to call Detective Eaton as their witness to establish the alleged perjury through him. This strategem, as Judge Frankel properly ruled, was an impermissible means of attempting to controvert the warrant (JA 1527-28).

Faced with that ruling, appellants expressed a desire to call the informant who they hoped would deny having the conversations. The defense claimed that one Donald Bode was the informant but disclaimed knowledge of his whereabouts. Government counsel represented that he knew the informant's identity, but refused to disclose his name to defense counsel. Furthermore, the Government, like the defense, did not know of Bode's whereabouts and so apprised defense counsel and Judge Frankel (JA 1542).

To buttress its claim that Bode was the informant, the defense sought a writ directing that one Michael Cassesse, a convicted narcotics dealer then serving his sentence in a New York State prison, be produced to give testimony that he was not the informant. Judge Frankel denied the application on the grounds that his testimony was unnecessary, since he accepted the representation that Cassesse was not the informant (JA 1542-43).

Although Bode was unavailable to testify, there was another person available who reportedly could prove the alleged perjury, namely, Joseph Della Valle. Capra's attorney represented to the trial court that Della Valle had told his investigator that he "never spoke to or never knew" Bode (JA 1545, 1547). On the other hand, after Government counsel disclosed that Capra's lawyer also represented Joseph Della Valle in another matter, Judge Frankel was told that if subpoened to testify, Della Valle would assert his Fifth Amendment privilege (JA 1547). Judge Frankel's comment on this extraordinary performance by the defense bears repetition here:

> "The Court: Wherever you represent him, I feel very strongly, Mr. Slotnick, that whether you are his lawyer or not, you can't have it both ways. You can't stand up here and make a record, to use your expression, of useful things he would say, if he took the witness stand, which he is not going to say because he is protected against saying them by the Fifth Amendment to the United States Constitution.
>
> "Whether you are his lawyer or not, it seems to be a very dubious way to make a record, to assert as facts things that the witness won't say one way or another because of his Fifth Amendment privilege. I regard them as being less than worthless" (JA 1547-48).

The record plainly reveals that appellants failed to present any facts to support their accusation that Eaton's affidavit was perjurious. Since there was no initial showing of "falsehood or other imposition" upon the issuing judge, no evidentiary hearing was necessary with respect to the truth of Eaton's affidavit. *United States* v. *Dunnings,* 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970); *United States* v. *Halsey,* 257 F. Supp. 1002, 1004-1006 (S.D.N.Y. 1966); *United States* v. *Forlano,* 358 F. Supp. 56, 59 (S.D.N.Y. 1973); *United States* v. *Askins,* 351 F. Supp. 408, 413 (D. Md. 1972).

Nor was there any obligation on the part of the government to identify the unavailable informant. In *United States* v. *Johnson,* 467 F.2d 630, 640 (2d Cir. 1972), this Court held that:

> "Disclosure is required when the accuracy of the informant's information is in doubt and the information was the 'essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause."

Here there was no evidence to raise any doubt about the accuracy of the informant's information. Moreover since most of the information establishing probable cause was obtained by Eaton himself or other police officers, including finding the notation in the telephone book, the overhearing of the October 29th telephone conversation and the surveillance, it is clear that the informant's information was not the "' essence or core or main bulk' " of the evidence. Under these circumstances, there was no need for identification of the informant. *United States* v. *Johnson, supra; United States* v. *Comissiong,* 429 F.2d 834 (2d Cir. 1970); *United States* v. *Tucker,* 380 F.2d 206, 212 (2d Cir. 1967).

2. The amendment of the wiretap order to include conversations of Stephen Dellacava was made as soon as practical under existing circumstances; continued interception of Dellacava's narcotics related conversations pending amendment was proper.

The main challenge to the legality of the wiretap is based on the fact that Dellacava was overheard on the December 8th order providing for the interception of only Della Valle's narcotics related conversations and that the order of January 6, 1972 authorizing the interception of Dellacava's conversations was unduly delayed, since Dellacava's separate identity became known by at least December 19, 1971. As the District Court concluded, however, the argument was not sufficient to warrant suppression.

There is no specific provision in the New York Criminal Procedure Law for amending a wiretap order to include the names of other subjects found to be involved in the same crime under investigation. N.Y.C.P.L. § 700.65 permits the interception and use of information relating to offenses other than those specified in the order of authorization, but it must be subsequently approved by a judge based on a finding that the contents were intercepted in accordance with the law.* An amendment to include the names of other persons whose conversations have been overheard discussing the same crime is plainly analogous and should be governed by the same standard.

Whether an application to amend an order was made as soon as practical depends in each case upon the circum-

* The corresponding federal statute, 18 U.S.C. § 2517(5), similarly provides that an amendment to include interceptions relating to other crimes "shall be made as soon as practical". Similarly, there is no provision in the federal statute for amending an order to include the names of other subjects found to be involved in the same crime under investigation.

stances then existing. *People* v. *Sher*, 68 Misc. 2d 917, 329 N.Y.S. 2d 2 (Greene Co. Ct. 1972). In *Sher* a warrant was issued on May 4, 1971 to intercept conversations related to gambling. On May 11, 12 and 13, conversations relating to grand larceny were overheard. Application for amendment was made on May 26, 1971, or some 15 days after the first conversation relating to the other crime, and the amended order was issued on July 22, 1971. During the 15-day period preceding the application, the investigators were monitoring calls, evaluating recordings, conducting surveillances, preparing affidavits, conferring with their counsel and the District Attorney as well as performing other investigatory duties. Under these circumstances the court found that the amendment was made as soon as practical.

Testimony adduced at the minimization hearing below established that prior to December 19, 1971, several narcotic related telephone conversations involving an individual referred to as "Beansie" were intercepted over the telephone at Diane's bar. The monitoring officers then believed that this individual was Joseph Della Valle.*

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* Dellacava challenges Eaton's testimony concerning the problem of voice identification, which problem Judge Frankel found to be "substantial" during the wiretap (JA 215). It is claimed that prior to the wiretap Eaton "confessed" that his prior familiarity with Della Valle's voice would not equip him to identify Della Valle during the tap and that this "confession" rendered the application for the eavesdropping warrant invalid. Eaton, however, never made any such confession. On the contrary, he testified at the hearing that he "didn't think [he] would have that much difficulty [identifying the voice of Della Valle]" (Tr. 1099). Secondly, although Eaton's familiarity with Della Valle's voice was not extensive, it unquestionably was sufficient to warrant the issuance of the wiretap. See *United States* v. *Rizzo*, Dkt. No. 73-2012 (2d Cir., February 7, 1974). Slip op. 1671 at 1679.

Eaton's credibility also is attacked on the ground that he had learned during a prior wiretap that "Beansie" was Dellacava and thus should have known that the "Beansie" overheard on the

[Footnote continued on following page]

On Sunday, December 19, Detective Eaton ascertained for the first time that "Beansie" and Della Valle were not one and the same person. Eaton immediately communicated this information to Lieutenant Hill, who instructed him to see Clifford Fishman, Esq., the Assistant District Attorney supervising the tap.

The following day, Monday, December 20, Detective Eaton met with Mr. Fishman in his office and fully apprised him of the interception of narcotic related telephone conversations of an individual referred to as "Beansie". A decision was made to begin preparing an application to amend the order to intercept such conversations. In the interim, Fishman instructed Eaton to continue listening to relevant telephone conversations of "Beansie" and to identify him if possible. He also requested Detective Eaton to keep him informed on a more frequent basis as to his progress in this regard.

Diane's Bar tap was the same individual who had been previously identified as Dellacava and thus not Della Valle. Eaton, however, testified that during the Diane's Bar tap, he did not recall having heard the names "Beansie" or "Stevie" mentioned in connection with the prior investigation (Tr. 1199). The District Judge credited Eaton's testimony concerning his belief that during the initial ten days of the wiretap that the overheard conversations of "Beans", "Beansie" or "Stevie" were those of Joseph Della Valle. Judge Frankel's conclusion with regard to the matter of misidentification aptly summarizes the matter:

> "The court . . . is led to realize that the surveillance was not as meticulous and limited as more nearly perfect detective work would have made it. But none of the imperfections indicates more than human fallibility within tolerable limits. To be sure, better detective work would presumably have forestalled points pressed by defendants. But this is not because any of the omissions pinpointed now was generated by any disposition to ignore or violate the rights of privacy with which both the statutes and the Fourth Amendment are concerned" (JA 219-20).

Here, as in *People* v. *Sher, supra,* the monitoring officers during the 17 day period preceding the amendment of the order continued to have numerous duties concerning the wiretap at Diane's Bar. The facts established at the minimization hearing amply justify the conclusion that under the circumstances the amendment was obtained "as soon as practical."

During this period, the officers, including Detective Eaton, continued monitoring conversations over the telephone at Diane's. Moreover, the monitoring group assigned to this wiretap was often understaffed. For example, when the above referred-to conversation of December 19 was intercepted, Detective Eaton was the only officer in the plant. During this period recordings had to be evaluated and transcribed for Mr. Fishman's use in amending the order. Telephone numbers obtained from the pen register had to be identified by the telephone company. In addition, the plant had to be occasionally closed to maintain surveillance. In fact, it was during one of these surveillances, which occurred on December 23, 1971, that the identification of "Beansie" as Steven Bellacava was made.

Detective Eaton communicated the identification of "Beansie" to Mr. Fishman the following day, Friday, December 24. In the interim, Mr. Fishman had begun to review the transcripts provided by Detective Eaton on December 20 for the purpose of amending the order. He also began discussing the matter with more experienced Assistant District Attorneys in his office (Tr. 806-7).

Mr. Fishman testified that he did not work on the Christmas weekend—December 25 and 26—or on Monday, December 27. On Tuesday, December 28, Mr. Fishman spent over four hours with Detective Eaton working on the proposed amendment and extension of the order. During the afternoon of the 28th, he prepared a memorandum to another Assistant in his office concerning the proposed

amendment and extension. This memorandum became the basis for the affidavit finally submitted. On December 29, Mr. Fishman again conferred with another person in his office on this matter (Tr. 890-91).* In addition, Mr. Fishman testified that he typed the affidavits and warrants himself (Tr. 814). Finally Mr. Fishman also had other matters to attend to in his office, including a trial, during this 17 day period.

Under these circumstances it cannot be said that Judge Frankel's finding that the delay was "reasonable" (JA 224) was clearly erroneous.

Mr. Fishman's decision to permit the officers to continue monitoring narcotic related conversations of Dellacava pending amendment of the order was not improper. Again, analogy may properly be made to the procedures prescribed under N.Y.C.P.L. § 700.65 for amending orders to cover a different crime. In *People* v. *Sher, supra,* the monitoring officers continued to monitor conversations relative to grand larceny following the initial interception on May 11. For example, similar conversations were intercepted on May 12 and 13. On May 20, interceptions indicated that further conversations relating to grand larceny were forthcoming. All of these conversations were held to be properly intercepted despite the fact that the application for the amending order was not made until May 26.

In *United States* v. *Cox,* 449 F.2d 679 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972), a federal wiretap order was issued authorizing the interception of narcotic related

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* Mr. Fishman characterized his efforts during this period as follows:

> "I wanted to make sure I had touched every base, consulted with other people in my office, and I wasn't leading the officers astray. They were relying on me for legal advice and I wanted to make sure every way I could that that advice was proper."

conversations over a telephone listed in the name of Leonard E. Richardson. During the course of the tap, the monitoring agents overheard conversations relating to a bank robbery. Pursuant to Section 2517(5), an order was *subsequently* issued authorizing use and disclosure of these conversations, which were thereafter introduced at the bank robbery trial of Cox and one Maurice La Near. In upholding the constitutionality of the statute, the Court of Appeals stated:

> "It would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search as that involved here. It would be irrational to hold that officers authorized to listen to conversations about drug traffic, upon learning that a bank robbery is to occur, must at once close down the project and not use the information to prevent the robbery since the information is tainted. It would be demoralizing to allow the bank to be robbed while the investigators stood by helpless to prevent the occurrence. Harder cases can be imagined. For example, in electronic surveillance of organized criminals involved in gambling, information might be intercepted disclosing a conspiracy to commit murder. Surely the officials must be empowered to use this information notwithstanding the lack of specific prior authorization." *Id.* at 687.

Through December 19, 1971 the monitoring officers had intercepted several conversations of Stephen Dellacava relating to narcotics trafficking. To prohibit further interception of conversations relating to the same crime for which the eavesdropping had been authorized pending the mechanical process of applying for an amendment is equally unreasonable.

The continued interception of Dellacava's narcotics related conversations between December 21 and January 6 can also be upheld independently on the "plain view" analogy applicable to the seizing of tangible evidence and instruments of crime. It is settled law in search and seizure cases that certain items not in a search warrant may be seized if discovered in the course of a lawful search. *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Harris* v. *United States,* 331 U.S. 145, 155 (1945). Thus, monitored conversations relating to narcotics activities of a third party not named in an otherwise valid court authorized wiretap should be similarly admissible. *Cf. United States* v. *Kahn,* 42 U.S.L.W. 4241 (U.S., February 20, 1974).

3. The monitoring officers properly minimized the interception of telephone conversations during the wiretap at Diane's Bar.

A further line of attack on the Diane's Bar wiretap made below was that the monitoring officers had not sufficiently minimized the interception of non-pertinent conversations over the telephone. This argument renewed by appellants here is wholly without merit. The evidence presented at the suppression hearing led Judge Frankel to conclude that those in charge of the wiretap "were carefully attentive to, and concerned about, the minimization requirement" (Memorandum Opinion, December 4, 1973 at 3, JA 210).

From the outset there was a concern on the part of Clifford Fishman, Esq., the Assistant District Attorney in charge of the investigation, to make sure that the execution of the wiretap was carried out within the requirements of the law. Recognizing that this was an unsettled area of law, he immediately sought advice from other Assistant District Attorneys, including Herman Kaufman, a member of the Appeals Bureau, with considerable experience in this field.

On November 23, 1971 Mr. Kaufman specifically instructed not only Mr. Fishman, but also Detective George Eaton and other monitoring officers to be particularly careful in executing the warrant because calls were to be intercepted over a public telephone.* He emphasized that it was reasonable to expect that a number of innocent people would be using the telephone and cautioned Detective Eaton and his fellow officers to make a good faith effort to minimize the interception of such conversations (Tr. 749).**

On December 8, 1971, the day before the wiretap became operative, Mr. Fishman met with Lieutenant John Hill, the commanding officer in charge of the investigation, Detective Eaton and other monitoring officers. He again stressed the instructions given by Mr. Kaufman on November 23 concerning monitoring conversations over a public telephone. He instructed the officers that they only had authority under the order to listen to conversations of Joseph Della Valle relating to narcotics; that privileged conversations—which he defined—could not be intercepted; and that the tape recorder was never to be left on automatic. In addition, he asked to be notified immediately if conversations relating to other crimes were intercepted or if others not named in the order were overheard discussing narcotics. Finally he asked to be kept posted on all developments during the course of the wiretap (Tr. 751-52).

The record is clear that Mr. Fishman was advised on the progress of the wiretap. He not only conferred with Detective Eaton throughout, but received and reviewed

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* During the trial, it was established that the telephone at Diane's Bar was not used by the general public, but was used instead by Dellacava and his associates for their personal benefit. If a stranger entered the bar and asked to use the telephone, he was told that it was temporarily out of order (Tr. 829-30). See *United States* v. *Rizzo*, *supra*, at 1676

** "Tr." refers to the stenographic transcript of the pre-trial hearing.

transcripts of all pertinent calls (Tr. 752-53). Lieutenant Hill and Detective Eaton made sure that each monitoring officer was fully apprised of the instructions given by Messrs. Kaufman and Fishman.

It is evident that during the course of the wiretap the monitoring officers did make a good faith effort to follow these instructions carefully in executing the warrant. The record plainly supports the conclusion that the monitoring officers "took reasonable measures to minimize the interception of irrelevant conversations", exhibited "a high regard for the right of privacy" and did all they reasonably could to avoid unnecessary intrusion" *United States* v. *Tortorello, supra,* 480 F.2d at 783, 784.

Thus, as the District Judge found, the recording machine was operative only while police officers were monitoring the intercepted calls (JA 210-11). Government Exhibit 16—a tape recording of the first 15 logged telephone conversations intercepted at Diane's on December 9, 1971—is representative of the pattern of interception of the many telephone conversations that followed. Of these, two were "no answers", two were "busy signals", and two were incomplete. The monitoring officers stopped listening and turned off the tape recorder during five of the nine calls in which conversations were intercepted.

Perhaps the most dramatic proof of the monitoring officers' good faith effort to minimize the interception of innocent calls is evidenced by two conversations played for the trial court by defense counsel. Both calls involved the defendant Dellacava; one was with his wife, the other with his daughter. (December 15 at 1812 and December 14 at 1901, respectively.) During each the monitoring officer ceased interception and turned off the recorder.

During the course of the wiretap, approximately 1561 calls were intercepted, *i.e.,* monitored and/or recorded. Of

these, 402 calls were "incomplete" in that they were to wrong numbers, calls for information, busy signals, etc. Of the 1159 completed calls, 751 were monitored in full and in the remaining 408 cases, monitoring was terminated. Of those calls monitored in full, 620, or approximately 83% were less than two minutes in duration; 302, or approximately 40%, were less than 30 seconds (GX 14, 15). In the longer calls, as many as three different persons in Diane's would participate in a single conversation with the party on the other end. Further compounding the difficulty in determining pertinency was the fact that the language of the intercepted conversations was frequently coded. When narcotics were unavailable, people became "sick". When the drugs became available, these people suddenly regained their health and began to exchange "Christmas presents" and meet for "chess games". Packages of narcotics were referred to as "big fellers" and "little fellers" and money became the "hor d'oerves" served at the "chess games". These coded calls had to be relistened to and decoded.*

In addition, the voices of several people using the telephone in Diane's sounded similar.** Parties to the inter-

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* The pertinency of many of these coded conversations was not immediately apparent to some of the monitoring officers who were unfamiliar with the investigation. Detective George Eaton accordingly listened to the tapes of such conversations to re-evaluate them. In this way he identified as pertinent many calls that were initially marked "non-pertinent" by the monitoring officer.

Judge Frankel found that: "'Pertinency' is a concept of shifting and elusive dimensions. One conversation may be pertinent because it refers to an exchange of narcotics, while another may be pertinent merely because it indicates the whereabouts and future movements of the subject" (JA 214-15).

** Detective Eaton was the only police officer familiar with Della Valle's voice prior to installation of the tap. The problem of voice identification was perhaps best illustrated during the

[Footnote continued on following page]

cepted conversations rarely identified themselves, and when they did, various nicknames were used. Under these circumstances it would have been extraordinarily difficult for experienced monitoring officers to identify the voice of the subject and characterize the conversation in less than a minute and a half even if they had been more familiar with his voice at the outset. See *United States* v. *Bynum,* 485 F.2d 490 (2d Cir. 1973); *United States* v. *Sisca,* 361 F. Supp. 735 (S.D.N.Y. 1973); *United States* v. *Focarile,* 349 F.Supp. 1033, 1050 (D. Md.), *aff'd sub nom. United States* v. *Giordano,* 469 F.2d 522 (4th Cir. 1972), *cert. granted,* 411 U.S. 905 (1973); *United States* v. *La Gorga,* 336 F. Supp. 190, 196 (W.D. Pa. 1971).

Defense counsel selected 126 telephone conversations intercepted at Diane's Bar and played them for the district judge. These very conversations, which allegedly demonstrated a lack of minimization, clearly supported the opposite conclusion upon closer scrutiny.

Of the 126 conversations contained on Exhibits P and S, 76 were less than two minutes in duration. In fact, the monitoring officers stopped listening to 21 of *these* conversations, and accordingly the recorder was turned off. Of the 50 conversations exceeding two minutes, Judge Frankel specifically found that a "substantial number" had properly been deemed pertinent. Several were related to the commission of other crimes, and seventeen were conversations of Stephen Dellacava. Twelve of these were between Dellacava and a woman named "Jean".

Defense counsel argued that the conversations between Dellacava and "Jean" were personal and intimate in nature

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hearing when Capra's attorney, while playing a conversation intercepted on December 13, 1971 at 7:54 P.M. between an unknown male and a female, mistakenly identified the male as Stephen Dellacava. The voice of the unknown male was in many respects similar to that of Dellacava.

and should not have been intercepted. Unquestionably, many of these conversations were substantially devoted to personal unrelated matters. However, there were numerous exchanges between the two which indicated not only that "Jean" was fully aware of Dellacava's narcotics activities, but may have been involved in them* herself. More important, through these conversations the monitoring officers were often able to determine Dellacava's planned whereabouts. *United States* v. *Bynum, supra,* 485 F.2d at 502. For example, in the final conversation played for the trial court, "Jean", after learning from Dellacava that he was leaving to go "uptown", asked him to call later so she would know he was alright (Defendants' Ex. P, intercepted at 12:21 A.M. on December 22). During surveillances conducted of Dellacava during the investigation, the officers learned that "uptown" referred to the Havemeyer club in the Bronx frequented by Capra, Guarino and Dellacava.

Section 2518(5) requires the minimization, not elimination, of irrelevant communications. In *Bynum* this Court stated that ". . . no electronic surveillance can be so conducted that innocent conversations can be totally eliminated." 485 F.2d at 500; see also *United States* v. *Manfredi,* 488 F.2d 588, 599 (2d Cir. 1973).** While it is true that some non-pertinent conversations were intercepted during the course of the tap, the record in this case amply

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* Thus, for example, on December 10, 1972 at 1842 hours "Jean" had a conversation with Dellacava (then unidentified) in which she referred to herself as his "secretary" and his "accountant".

** Dellacava argues that *Bynum* and *Manfredi* are distinguishable because here a "pattern of regular innocent calls and callers could be isolated" (Br. at 60). No such pattern of calls emerged from the wiretap. For the reasons already stated, a number of the calls between Dellacava and his girl friend were properly intercepted. Furthermore, during conversations between Dellacava and his wife and daughter the recorder was shut off. (See *supra,* p. 49).

justifies the conclusion of the trial court that there was proper minimization in the interception of non-pertinent conversations under CPL § 700.30(7).

4. Notice.

Dellacava argues that the notice requirement of CPL § 700.50(3) was violated because he was not served with written notice within 90 days of the termination of the wiretap. The record shows, however, that Justice Birns authorized the delay and properly so, since "the continuing investigation might [have been] thwarted or impaired by premature disclosure of its existence" (JA 226). This authorization was clearly permissible. *United States* v. *Manfredi, supra,* 488 F.2d at 602.

The claim of prejudice is frivolous. The argument is based on the assumption that if notice had been served on Dellacava within the 90 day period, he would at that time somehow have been able to locate Donald Bode and thus allegedly prove that the application for the warrant was perjurious. This argument is crafted from the sheerest speculation and does not deserve serious attention.

5. The arrest of Dellacava on February 3, 1972 was proper.

Dellacava argues that the testimony relating to his arrest on February 3, 1972 and the seizure of a toiletry kit containing $11,500 from the trunk of his car at that time should have been suppressed. He also claims that the trial court erred in denying his application for a separate hearing to test the validity of that arrest. Neither of these claims has merit.

On the evening of February 3, 1972 DeDllacava and Guarino were arrested by New York City police officers near Rockefeller Center in Manhattan as Dellacava was about to deliver $11,500 to Guarino, which Dellacava had obtained from Jack Brown. The cash was concealed in a

black toiletry case found in the trunk of Dellacava's car. The money itself was not introduced at trial, but testimony relating to the arrest and the seizure was admitted.

Dellacava's arrest resulted from information discovered during the course of the wiretap at Diane's Bar. In his motion of September 5, 1973, he moved to suppress all evidence obtained as a result of the wiretap. However, he did not allege as a separate ground for suppression that the arrest was invalid because probable cause was lacking or that the seizure was illegal under the Fourth Amendment for reasons other than the invalidity of the wiretap.* On September 21, 1973, during the course of the hearing on the wiretap, Dellacava's attorney stated that he wanted a separate hearing to prove that the arrest was not supported by probable cause. Judge Frankel properly denied the application on the ground that he had already granted a hearing on the issue of whether the arrest was the product of an unlawfully executed wiretap and, additionally, that since Dellacava had known about the arrest and seizure for a year and a half but had not raised the additional grounds for suppression in his earlier motion, the request for a further hearing was untimely (Tr. 734-735).

Judge Frankel's decision denying Dellacava's motion, which would have further expanded the lengthy pre-trial hearings and further delayed the trial, was well within his discretion. Rule 41(e) Fed. R. Crim. Proc. provides that: "The motion to suppress shall be made before *trial or hearing* unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing" (emphasis added). Dellacava's oral

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* The moving papers stated in pertinent part: "Our contention on this score is, of course, that such evidence would be inadmissible, having been derived directly through the two invalid wiretaps" (Tr. 737).

motion to suppress was not made before the hearings in this case although he was aware of the pertinent facts for a year and a half, and accordingly Judge Frankel properly declined to hear it. See *United States* v. *Sansone,* 231 F.2d 887, 891-92 (2d Cir.), *cert. denied,* 351 U.S. 987 (1956); *United States* v. *Roth,* 430 F.2d 1137, 1139 (2d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971).

Furthermore, the issue of whether the arrest was supported by probable cause was not presented in Dellacava's earlier motion "with sufficient definiteness, clarity and specificity" to raise any issue of fact warranting a hearing.* *United States* v. *Carrion,* 463 F.2d 704, 706 (9th Cir. 1972).

Apart from the matter of waiver, the record clearly establishes that there was abundant probable cause to sustain the arrest of Dellacava. Dellacava's telephone conversations with Jack Brown on December 21, 23 and 29, 1971 in which they discussed the exchange of "Christmas presents" together with Dellacava's conversation with the Capra on December 23 and the accompanying surveillance on that date, during which Dellacava was seen obtaining a brown paper package from the trunk of a Lincoln Continental, placing it in his own automobile and then driving to the vicinity of Brown's apartment in a manner calculated to elude surveillance, plainly permitted the inference that Brown was a narcotics customer.

This conclusion was immeasurably strengthened by the events of January 10 and February 2 and 3, 1972. On January 10 Brown telephoned Dellacava and suggested that they get together for a game of "chess." Dellacava asked if he should bring the "big fellow" and Brown replied,

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* Dellacava's reliance on Guarino's pre-trial motion attacking the arrest is misplaced, since Guarino plainly lacked standing to challenge the seizure of the $11,500 from the trunk of Dellacava's car. *Brown* v. *United States, supra; Alderman* v. *United States,* 394 U.S. 165, 171-72 (1969).

"Yeah, bring a hogie sandwich." On February 2, Brown again telephoned Dellacava, suggested another game of "chess" for the following evening, requested Dellacava to bring "my little friend," and mentioned that he would provide the "hors d'oevres and things."

On the evening of February 3, the night of the arrest, Dellacava spoke to Guarino who inquired if Dellacava had seen "our friend . . . Jack" and provided a telephone number where Jack Brown could be reached. Dellacava then spoke to Brown's wife, after which he agreed to meet with Guarino at 10:30 P.M. near the statue at Rockefeller Center.

Dellacava then drove at a high rate of speed to New Jersey where he eluded surveillance. At about 10:00 P.M. he returned to New York and drove to Brown's Manhattan apartment for the scheduled "chess game," which lasted for five or six minutes. When he left the apartment, he was observed carrying a small black toiletry case which he placed in the trunk of his car. He then drove to Rockefeller Center where he met Guarino. Both of them were then placed under arrest and the toiletry case containing $11,500 was seized from the trunk of Dellacava's car.

Dellacava argues that the overheard conversations were of little or no value in providing probable cause since they did not contain "recognized narcotics argot." However, Judge Frankel found as a fact "that the references to 'chess' and to 'a little friend' very likely had to do with narcotics transactions" (JA 214). See *United States* v. *Barrone-Iglar,* 468 F.2d 419, 421 (2d Cir. 1972), *cert. denied* as *Gernie* v. *United States,* 410 U.S. 927 (1973). It is indisputable that these coded references and cryptic conversations were designed to disguise the true subject matter of discussion.

Furthermore, there were significant facts which pointed to the conclusion that the subject matter was narcotics. First, Detective Eaton knew that Dellacava had been arrested at least 11 times between 1946 and 1948, five of which were arrests by federal authorities for narcotics violations (JA 276). Second, the package wrapped in brown paper which Eaton observed Dellacava remove from the Lincoln Continental and place in his own car on December 23, 1971 "was similar in size and shape to packages [he had] previously seen which contained a half kilogram of heroin" (JA 277). See *United States* v. *Santana,* 485 F.2d 365, 368 (2d Cir. 1973). Third, Dellacava's repeated efforts to evade surveillance permitted the inference that that he was attempting to conceal illicit activity. Fourth, Dellacava's five minute "chess" game with Jack Brown convincingly demonstrated that chess was not the subject of their meeting. Fifth, the time and place of the meeting with Guarino coupled with the fact that Dellacava emerged from Brown's apartment with the black toiletry kit strongly compelled the conclusion that Dellacava would be going to deliver the payment received from Brown to Guarino.

All the circumstances pointed to the obvious conclusion that a narcotics transaction was in the process of being concluded within the sight of experienced narcotics officers. *United States* v. *Chaplin,* 427 F.2d 14 (2d Cir.), *cert. denied,* 400 U.S. 830 (1970); see also *United States* v. *Wabnik,* 444 F.2d 203 (2d Cir.), *cert. denied,* 404 U.S. 851 (1971). Consequently there was probable cause for Dellacava's arrest and Guarino's as well. Since there was probable cause for the arrest, and since there was probable cause to believe that Dellacava had used his automobile to facilitate a narcotics transaction, the seizure of the toiletry kit containing the $11,500 was proper. See Point III, *infra.*

POINT III

The District Judge properly denied Dellacava's motion to suppress evidence found in the trunk of his car.

Prior to trial Dellacava moved to suppress money and narcotics paraphernalia taken from the trunk of his car shortly after his arrest on the morning of April 14, 1973. Judge Frankel held an evidentiary hearing and filed an opinion dated October 16, 1973 denying the motion (JA 154-62).

Dellacava while driving a 1973 Oldsmobile sedan, was arrested, pursuant to a bench warrant issued in this case, at approximately 2:00 A.M. on the morning of April 14, 1973, at the corner of Lexington Avenue and 86th Street in Manhattan (Tr. 142-43).* The arresting officers ** had observed Dellacava, just prior to his arrest, at Bachelors III, a restaurant-bar located on Lexington Avenue in the east sixties (Tr. 154). It was determined that the arrest should be made, if possible, at a distance away from the bar to prevent other persons, scheduled for arrest and thought to be inside Bachelors III, from learning of Dellacava's apprehension (Tr. 274).

After leaving the bar, Dellacava got into his automobile and drove north. The officers followed and intercepted his automobile at the intersection of 86th Street and Lexington Avenue. Dellacava was searched for weapons but, when a crowd began to gather, the officers drove with him and his

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* References to the transcript of the suppression hearing, held on September 18, 1973, are cited to their original transcript page numbers and appear as "Tr. .....".

** The four arresting officers were: Group Supervisor James Becknar and Special Agent David Samuel of the Drug Enforcement Administration and Sergeant Timothy Restivo and Detective George Eaton of the New York City Police Department.

car to a sanitation department garage near the West 79th Street boat basin (Tr. 143-44, 260-61).

After advising Dellacava of his rights, the arresting officers proceeded to impound his car and inspect it in his presence (Tr. 144). In the trunk they found a machine for sealing plastic bags or containers, and a brown gym bag containing $13,999.00 in currency. Subsequent laboratory tests revealed traces of heroin in the gym bag (Tr. 145-46).

Judge Frankel concluded that the arresting officers acted reasonably and sensibly in waiting for Dellacava to leave Bachelor's III before making the arrest.* He correctly found that the officers had probable cause to believe at the time of arrest that Dellacava's automobile was being, or had been used to facilitate the transportation or possession of contraband narcotics. The vehicle was therefore subject to seizure, search and forfeiture under 49 U.S.C. § 781 and § 782.**

A vehicle seized *** with probable cause to believe that it contains, or has been used to facilitate the transportation of, contraband is subject to forfeiture and search without a warrant, *Cooper* v. *California,* 386 U.S. 58 (1967); *United*

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* The district judge concluded that the brief delay was not a pretext for searching appellant's car. Although in his pretrial argument Dellacava focused on the alleged unreasonableness of this delay and the alleged prejudice resulting from it, he seems to have abandoned this claim on appeal.

** See also 21 U.S.C. § 881(a); 21 C.F.R. § 316.72.

*** The arresting officers were fully justified in moving the car from the intersection of Lexington Avenue and 86th Street to a more secure location when a crowd began gathering at the scene of the arrest. *United States* v. *Rosa,* Dkt. No. 73-2324 (2d Cir., March 26, 1974); *United States ex rel. Spero* v. *McKendrick,* 409 F.2d 181, 183 (2d Cir. 1969); *Evans* v. *United States,* 385 F.2d 824 (7th Cir. 1967); *Leffler* v. *United States,* 409 F.2d 44, 49 (8th Cir. 1969).

States v. *Ortega*, 471 F.2d 1350, 1360 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States ex rel. Spero* v. *McKendrick*, 409 F.2d 181 (2d Cir. 1969); *United States* v. *Francolino*, 367 F.2d 1013, 1018-23 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967), and Judge Frankel's finding that the agents had probable cause to believe that the car had been and was being used to transport narcotics was fully justified. All of the officers were aware that Dellacava had been indicted for participation in a huge narcotics conspiracy. Agent Samuel had first learned of Dellacava and his narcotics involvement some eight months prior to the arrest (Tr. 178). Detective Eaton, who had been involved in the investigation since late 1971, had conducted visual and electronic surveillance of Dellacava (Tr. 235-36) and, as Judge Frankel found, was aware of Dellacava's narcotics activities and had observed his use of automobiles in narcotics transactions (see, *supra*, at 17-20, 56-57). Indeed, the arresting officers were aware that at the time of Dellacava's February 3, 1972 arrest, in which Detective Eaton participated, inspection of the trunk of Dellacava's vehicle disclosed a black toiletry kit containing $11,500 in cash (see, *supra*, at 56-57). The officers were justified in believing that Dellacava's delivery activities routinely involved use of his automobile to collect cash payments for delivered narcotics.

Moreover, Dellacava's suspicious conduct prior to his arrest was highly relevant to the officers' consideration of probable cause. He was observed inside Bachelors III at the same time two other narcotics violators, Thomas Lentini and Jerry Zanfardino for whom arrest warrants had been issued, were believed to be on the premises (Tr. 165-6, 242, 246). The officers, whose experience with Dellacava's past activities was extensive, reasonably believed that Dellacava was continuing to engage in criminal conduct involving narcotics that very evening and, as in the past, was using his 1973 Oldsmobile sedan, which had already been observed parked nearby on the street and which the officers knew

Dellacava regularly drove (Tr. 161, 162), to do so. The suspicions solidified when, after leaving the bar shortly before 2:00 a.m., Dellacava stopped twice within three blocks to make telephone calls from separate public telephone booths (Tr. 174). Finally, Agent Samuel testified that while the officers were following Dellacava in their vehicle, Dellacava "began to take off" an action which, since he was unaware of the warrant out for his arrest, can only have meant that he had in his possession something he did not want the surveilling officers to find, clearly related to his narcotics activities. He was searched on 86th Street but nothing was found. The only reasonable conclusion was that the evidence he sought to keep from the officers was secreted somewhere in the car, as indeed it proved to be (Tr. 182-83). In view of all these circumstances, and the indictment under which Dellacava was arrested, the officers had more than sufficient probable cause to believe Dellacava's car either had been or was being used to transport, or to facilitate the transportation of, contraband narcotics.* The search was closely related to the reason Dellacava was arrested, the reason his car was impounded and the reason his car was retained, *Cooper* v. *California, supra,* 386 U.S. at 61; *United States* v. *Young,* 456 F.2d 872, 875 (8th Cir. 1972); *United States* v. *Mazzochi,* 424 F.2d 49, 51 (2d Cir. 1970). Accordingly, Dellacava's vehicle was subject to a warrantless seizure and search.**

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* To the extent the officers had probable cause to believe the car contained evidence of a crime then being committed, the search was also valid under *Carroll* v. *United States,* 267 U.S. 132 (1925); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *United States* v. *Christophe,* 470 F.2d 865, 868-869 (2d Cir.), *cert. denied* as *Pierro* v. *United States,* 411 U.S. 964 (1972).

** Dellacava's reliance on *Preston* v. *United States,* 376 U.S. 354 (1964), is wholly misplaced. *Preston* "stands only for the proposition that the search challenged there could not be justified as one incident to arrest." *Cady* v. *Dombrowski, supra,* 413 U.S. at 444. *Preston* has no bearing in a case involving other exceptions to the warrant rule. Indeed, after *Edwards* v. *United States,* 42 U.S.L.W. 4463, 4466 (dissenting opinion) (U.S., March 26, 1974) it is questionable whether *Preston* retains vitality even where asearch is claimed to be justified as incident to arrest.

Moreover, even in the absence of probable cause, it was entirely proper for the police to take custody of Dellacava's automobile and to inventory its contents. Since Dellacava had been arrested at a busy intersection in the middle of the night alone in his automobile, it was perfectly proper that they not abandon the automobile in the street, and it seems clear that they had an obligation to take custody of it. *Cady* v. *Dombrowski, supra,* 413 U.S. at 446-447. Having done so, both D.E.A. procedures and mandatory New York Police Department regulations required that the contents of the automobile be inventoried (Tr. 145, 268-270). *Cady* v. *Dombrowski, supra,* 413 U.S. at 443; *United States* v. *Kelehar,* 470 F.2d 176, 178 (5th Cir. 1972).* Such an inventory without a warrant or probable cause was not a violation of the Fourth Amendment *United States* v. *Mitchell* 458 F.2d 960, 962-63 (9th Cir. 1972); *United States* v. *Kelehar, supra; United States* v. *Pennington,* 441 F.2d 249, 250-252 (5th Cir.), *cert. denied,* 404 U.S. 854 (1972); *United States* v. *Boyd,* 436 F.2d 1203, 1205 (5th Cir. 1971); *United States* v. *Lipscomb,* 435 F.2d 795 (5th Cir. 1970), *cert. denied,* 401 U.S. 980 (1971). The cursory examination of the automobile trunk which disclosed the gym bag and the sealing iron was therefore perfectly proper. The $14,000 in currency inside the bag was in "plain view of an officer who had a right to be in the position to have that view . . . [became] subject to seizure and [could be] introduced in evidence." *Harris* v. *United States,* 390 U.S. 234, 236 (1968). The disclosure of such large amounts of currency in the gym bag in the context of a large narcotics conspiracy case made it more than reasonable to believe that the bag and its contents ". . . were evidence of the crime for which [Dellacava] was being held,

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* When an inventory inspection is conducted pursuant to departmental regulations, the examination can hardly be considered a pretext for an illegal search. The fact that the "finding of contraband was not unexpected" does not render illegal a lawfully conducted inventory inspection. *United States* v. *Kelehar, supra,* 470 F.2d at 178.

[and] the police were entitled to take, examine and preserve them for use as evidence. . . ." *United States* v. *Edwards, supra,* 42 U.S.L.W. at 4465. Such an examination, as *Edwards* makes clear, could properly include tests for traces of narcotics in the gym bag.

In any event, in view of the overwhelming independent evidence of guilt introduced against Dellacava at trial, including extensive wiretap evidence and Ramos' direct testimony, any error in admitting the fruit of the search of Dellacava's car was "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18 (1967).

POINT IV

The publicity surrounding Capra's arrest did not deprive him of a fair trial.

Capra claims that the publicity surrounding his arrest on April 14, 1973 fatally prejudiced his right to receive a fair trial more than 6 months later and that the indictment should therefore be dismissed. This contention has no basis in fact, since the publicity had no impact on the trial.

As Capra correctly points out, there was substantial news coverage of his arrest and those of numerous others on April 14, 1973, a warrant issued on nine indictments filed here and in the District of New Jersey and sealed. Photographs of certain of those arrested, including Capra, accompanied the news articles. However, the voluminous pre-trial motions filed by Capra and his co-defendants did not include any application directed toward the publicity attending the April arrests. The question of publicity first arose during a hearing on one of Capra's pre-trial motions held on September 18, 1973. In response to an inquiry by the trial court, counsel for Capra conceded that he had not theretofore raised the issue of publicity, but went on to state:

> "I felt that issue could properly be reserved until we picked the jury. If the jury was so infected by that publicity, we would be unable to pick a jury and your Honor would use his discretion in giving us a continuance (JA 301).

Trial commenced on October 18, 1973. Judge Frankel, in conducting the *voir dire* of the panel of jurors, carefully inquired whether any prospective juror had knowledge of, or had previously heard about the case or the defendants and co-conspirators named in the indictment. Each juror and alternate selected was free from any such knowledge. Furthermore, to insure the impartiality of the jury, the trial court granted the defense six additional peremptory challenges. The steps taken by the Court to select a fair and impartial jury were precisely those which the defense had requested. Apparently satisfied with the jury, Capra did not express any further concern about the matter of pre-trial publicity until November 14, 1973, when he moved for a mistrial based upon an article which appeared in New York Magazine having nothing whatsoever to do with the facts of this case. In denying the motion, Judge Frankel underscored the failure of the defense to make any timely motions with regard to the matter of pre-trial publicity:

> "The Court: It is very late, so don't tell me about the things that happened a long time ago. Those were of some interest to me as I heard about them, and frankly they troubled me, which is why I asked you whether you had any motions. Now you didn't have any, and it is for you and your able colleagues to conduct your case. I am sure that that subject, like all subjects, was scrutinized and studied by you and for whatever sufficient and good reasons you did not make any motions about it" (Tr. 3084).

The trial continued without further reference to pre-trial publicity. The jury returned its guilty verdicts at

10:25 A.M. on November 21, 1973, the day before Thanksgiving day. The Government moved to remand Capra, Guarino, Dellacava and Jermain, who were then at liberty on substantial bail (Tr. 4103-4105). After hearing defense counsel, Judge Frankel found it ". . . doubtful that even an increase in the money conditions of bail would supply the requisite assurance that the defendants will not flee." The trial judge also found that the ". . . defendants left at large are a danger to the community" (Tr. 4119). Nonetheless, because of what he called "an odd and human circumstance," Judge Frankel permitted the defendants to remain at large for Thanksgiving Day, even though Government counsel reminded the Court that the evidence at trial established that the defendants had previously spent Thanksgiving away from their families getting drunk and snorting cocaine and that their remaining at liberty for Thanksgiving would require separating a large number of agents from their own families to keep the defendants under surveillance (Tr. 4119-4122). The trial court was not persuaded.

Not surprisingly, the Judge's decision was the subject of considerable commentary in the media, and the news stories may fairly be said to have been negative in tone. New York Daily News, November 22, 1973, at 42; New York Times, November 23, 1973, at 39.*

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*At the time of sentencing Judge Frankel observed with regard to the newspaper coverage:

> "...I will simply say that I think it regrettable that the people in law enforcement, of whom I think there are many in this room, felt obliged to invite photographers to be with them while they valiantly guarded these defendants on Thanksgiving Day, that the risk was not commensurate with the dramatic performance staged by the members of the law enforcement operations, but that one of the advantages that the founding fathers worked out by appointing judges with life tenure, if not with high salaries, was that it is not necessary to be especially upset by the displeasure of law enforcement people on occasions like this . . ." (January 3, 1974, Tr. 71).

On November 27, 1973, the Monday after Thanksgiving Day, Judge Frankel *sua sponte* filed a memorandum stating that the question of pretrial publicity surrounding the defendants' arrests had been among those ". . . touched in pretrial hearings and left for further consideration at a later time . . ." and directing the Government to file a detailed response to questions in the memorandum covering the activities of the media at the time of the defendants' arrests and the participation by law enforcement officers generally and the United States Attorney's Office in particular in facilitating those activities.

By letter of December 12, 1973, the Government brought to Judge Frankel's attention that the question of pretrial publicity had not been left open, that the record established that nothing in the pretrial publicity was known to the jury empanelled in this case, and that the United States Attorney's Office shared Judge Frankel's concern about the pretrial publicity, but believed that any possible violation of the District Court rules on pretrial publicity should properly be the subject of a separate proceeding. By letter of December 12, 1973, Judge Frankel reiterated his direction that the Government respond in the manner set forth in his memorandum of November 27.

By letter of December 17, 1973, the United States Attorney for the Southern District of New York responded to Judge Frankel's memorandum of December 17. His letter indicated that certain newspaper men had been present at a preliminary briefing of the arresting agents on the night of the arrests and that certain of these accompanied the police on the arrest of Capra; that members of the United States Attorney's Office had not authorized the presence of the media at either the briefing or the arrest of Capra; that the members of the United States Attorney's Office had not known of the media representatives' presence at the arrest of Capra until afterwards and that they had first learned of their presence at the preliminary briefing some fifteen minutes before it began and had immediately

expressed their disapproval, but were advised by the law enforcement officials in charge of the briefing that the press had been permitted to be present in an effort to prevent publication of possible leaks prior to the planned arrests. The letter indicated that after the arrests, the then United States Attorney, Whitney North Seymour, Jr., had expressed disapproval to the Regional Director of the Drug Enforcement Administration of the manner in which the press coverage of the arrests had occurred and had requested and received a report from the Regional Administrator, a copy of which was sent with the letter of December 17, 1973 to Judge Frankel.*

After receiving submissions from the defense, the trial judge filed a memorandum on January 8, 1974, in which he criticized the newspapers for their coverage of the arrests, criticized the United States Attorney for suggesting that the matter of pretrial publicity had not been left open, while conceding that indeed it had not been, criticized the Government for its ineffectuality in dealing with leaks to the press, and criticized the United States Attorney for his attitude toward what had occurred and for his failure to take more positive action against the law enforcement officers who had permitted the press to be present at the briefing and at Capra's arrest. Nonetheless, Judge Frankel found that the "... trial does not seem perceptibly to have been infected by the publicity of some months earlier" and declined to grant a new trial (JA 163-185).

It is clear that the trial judge was correct in declining to grant a new trial on the ground of pretrial publicity. Any claim of this kind was unmistakably waived by Capra,

* The report disclosed, among other things, that no defendant was posed for photographing by the press before arraignment on April 16, 1973. The report of Deputy United States Marshal Martin Wall dated April 27, 1973 makes clear that those in charge of transporting the defendants to the United States Courthouse that morning attempted to shield the defendants from the press, but were prevented from doing so by the defendants themselves.

since he directed no pretrial motion to the subject and made no suggestion when the jury was empanelled that it had been affected by pretrial publicity or that it was other than fair and impartial. *Irwin* v. *Dowd,* 366 U.S. 717, 723 (1961); *United States* v. *Haynes,* 398 F.2d 980, 987 (2d Cir.), *cert. denied,* 393 U.S. 1120 (1968); *United States* v. *Ragland,* 375 F.2d 471, 475-476 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968).* Indeed, except for a few references by defense counsel at the trial in connection with publicity unrelated to any of the defendants that occurred long after the trial had commenced, no mention was made of pretrial publicity until the trial judge raised it *sua sponte* after the defendant's bail had been continued for Thankgiving following the verdict.

Moreover, even if Capra had raised the point timely, it is clear that he would be entitled to no relief. The jury empanelled here had never heard of any of the defendants or the co-conspirators or any of the facts of the case, as the painstaking *voir dire* conducted by Judge Frankel established. *United States* v. *Manfredi,* 488 F.2d 588, 603-604 (2d Cir. 1973); *United States* v. *Pfingst,* 477 F.2d 177, 186 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973); *Margolies* v. *United States,* 407 F.2d 727, 731 (9th Cir.), *cert. denied,* 396 U.S. 833 (1969).

Here the matter should rest, as it would but for the trial judge's remarks after he reopened the matter of pretrial publicity *sua sponte* after the verdict, remarks upon which Capra places substantial emphasis. It is clear, of course, as Judge Frankel found, that such publicity as there was at the time of the arrests of these defendants and others had no effect on the jury that was empanelled.

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* Capra's reliance on *Marshall* v. *United States,* 360 U.S. 310 (1959), *Rideau* v. *State of Louisiana,* 373 U.S. 723 (1963), and *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), is wholly misplaced, since in those cases the jury was clearly bombarded with prejudicial newspaper coverage during the trial.

It also is clear that the United States Attorney's Office in no way participated in the invitation of the media to be present at the preliminary briefing or at Capra's arrest, and that it made clear to the law enforcement agencies involved that it disapproved of some of what had been done. There was no violation of the Southern District's "Free Press—Fair Trial" Directives (Rule 8 of the Criminal Rules of the United States District Court for the Southern District of New York).

However, in the Government's view it was not improper for the press to be present at the preliminary briefing or to obtain information concerning the facts surrounding the arrests from Government agents. Almost all of the information reported by the press concerning the arrest of Capra, for example, would have been properly disseminated by attorneys for the Government under Rule 8 of the Southern District's Criminal Rules, which, in any event, does not apply to law enforcement agencies such as D.E.A. More important, while we believe strongly that defendants are entitled to a trial untainted by prejudicial publicity, we think that it is also important that, consistent with Rule 8 and Justice Department regulations, arrests and indictments in narcotics cases be the subject of news coverage as a warning to narcotics dealers that they ply their trade at their peril. To the extent that Justice Department guidelines were violated by the presence of reporters at Capra's arrest, the disapproval of this Office was made known at the time. In any event, it is perfectly clear that the reason that motivated the law enforcement officials who authorized the presence of the press was the desire to obtain press cooperation in preventing premature leaks which might alert some of those to be arrested. While Judge Frankel calls this strategy "unacceptable" and "impotent" and suggests that we should follow the British practice (presumably in their restriction on certain kinds of news reporting activities), the suggestion would appear to ignore the First Amendment to the Constitution.

POINT V

The jury properly found a single conspiracy among the defendants and their co-conspirators.

Three of the appellants, Capra, Jermain and Morris, seek reversal of their convictions on the ground that the indictment charged a single conspiracy whereas the proof at trial showed multiple conspiracies. They also urge that the trial court's failure to grant them severances constitutes reversible error. In view of the overwhelming evidence of a single, on-going conspiracy and their participation in that conspiracy, such claims are frivolous.

Beginning with the early meetings between Capra, Guarino, Dellacava and Ramos during the summer of 1969 and continuing through April 14, 1973, when Capra, Guarino, Dellacava and Jermain were arrested, the evidence at trial unmistakably showed the existence of a single conspiracy, based in the Bronx and Manhattan with tentacles reaching across the country, the purpose of which was the unlawful distribution of large amounts of heroin and cocaine for enormous profit.

The structure of this conspiracy conformed to the archetypical "chain" conspiracy which this Court has recognized in a host of cases, *see, e.g., United States* v. *Bruno,* 105 F.2d 921 (2d Cir.), *rev'd on other grounds,* 308 U.S. 287 (1939); *United States* v. *Stromberg,* 268 F.2d 256 (2d Cir.), *cert. denied,* 361 U.S. 863 (1959); *United States* v. *Agueci,* 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963); *United States* v. *Bynum,* 485 F.2d 490 (2d Cir. 1973); see generally. Note, Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387, 388-393 (1957), with links connecting the co-conspirators at critical points.*

* Appellants' reliance to *Kotteakos* v. *United States,* 328 U.S. 750 (1946) is wholly misplaced. In *Kotteakos* the Government

Capra, Guarino and, later, Sperling, as the executive group, were large-scale wholesale suppliers of narcotics who employed workers like Caruso and Conforti to prepare their narcotics, and other aides, such as Dellacava, to handle the details of delivery of and payment for narcotics sold to the organization's principal narcotic distributors, Jermain, Ramos, Metro and Brown. The distributors' search for customers led ultimately to the Detroit connection whose central figures were Morris, Harris and Simms. Together, appellants and their co-conspirators operated a tight, vertically structured operation whose illegal purpose they all shared. Each of the complaining defendants knew, or reasonably should have known, that he was a member of a large and continuing illicit scheme: in such a conspiracy, "the point of course, is that each level of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other." *United States* v. *Bynum, supra,* 485 F.2d at 495. As this Court recently held in *United States* v. *Arroyo,* Dkt. No. 73-2193 (2d Cir., March 22, 1974), Slip. Op. 2314-15:

> "[I]t has often been recognized especially where heroin is involved that it would be unrealistic to assume that major producers, importers, wholesalers

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conceded that the proof showed at least eight discrete and independent conspiracies. 328 U.S. at 754-55. It can hardly be asserted that the evidence in this case conformed to a similar pattern nor even that the evidence raised the hypothetical question suggested in *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), *cert. denied* as *Cinquegrano* v. *United States,* 379 U.S. 960 (1965), whether persons at the extreme end of a chain conspiracy adopt the attributes of participants in a "spoke" conspiracy, 336 F.2d at 383, inasmuch as these appellants "constituted the very core of an agreement." *United States* v. *Cirillo,* 468 F.2d 1233, 1238 (2d Cir. 1972), *cert. denied,* 410 U.S. 989 (1973). *Kotteakos,* as this Court has held, has no applicability to narcotics conspiracies of the kind which the Government proved at trial. *United States* v. *Rich,* 262 F.2d 415 (2d Cir. 1959).

> or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy."

The issue of whether the single conspiracy alleged in the indictment had been proved or whether the evidence showed several, separate independent conspiracies was placed squarely before the jury.* By their verdict, the jury found that a single conspiracy had been proved. Since the evidence overwhelmingly supported that finding and since the trial court's instructions on this subject were correct, the verdict on this count must stand.

The complaining defendants—Capra, Jermain and Morris—do not deny, on this appeal at least, their mutual involvement in an illegal plan to distribute narcotics with the "ultimate purpose [of] placing . . . the forbidden commodity into the hands of the ultimate purchasers." *United States* v. *Agueci, supra,* 310 F.2d at 826. Jermain contends, however, that the proof of his involvement in conspiratorial activities ended with the Toledo transaction and that no showing of Jermain's involvement in narcotics subsequent to October, 1971, was placed in evidence. Accordingly, he urges reversal on the grounds that evidence showed at least two conspiracies and that proof of post-1971 conspiratorial activities prejudiced him and denied him a fair trial.

The claim is based on fallacious legal and factual premises. Although the Government was entitled to a presump-

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* "I instruct you now and remind you that Count one does charge a single overall conspiracy and the government must prove such an overall conspiracy in order to make the first of the three essential elements on which I am now instructing you."

"So if the government has not established such a conspiracy, but has established only a variety of different and unconnected conspiracies among different people, there would be a failure of proof as to element one under Count one and you would have to acquit on that count (Tr. 3934-35).

tion, absent proof to the contrary, that the conspiracy once established was a continuing one, *United States* v. *Stromberg, supra,* 268 F.2d at 263; cf. *Hyde* v. *United States,* 225 U.S. 347, 369 (1912), ample affirmative evidence was offered at trial of the continuing operations of the conspiracy even after the Toledo seizure (See, *supra,* pp. 17-25). In view of the overwhelming evidence of a single conspiracy, including testimony which dated the conspiratorial association of Sperling, Capra and Guarino as early as April, 1971 (Tr. 335-336), a period in which even Jermain concedes he played an active role in the conspiracy, the trial court, after appropriate instructions, properly left the question of Jermain's putative withdrawal to the jury (Tr. 3945-3946).* Since Jermain offered no evidence of his withdrawal the jury could properly conclude that Jermain's membership in the conspiracy continued until his arrest.**

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* Indeed, the court's instructions were probably more favorable to Jermain than the law requires. This court has held that " 'participation in a conspiracy may continue beyond the performance of an overt act by the alleged conspirator, if the conspiracy continues in existence thereafter; affirmative proof of withdrawal is generally required' to terminate liability." *United States* v. *Cirillo, supra,* 468 F.2d at 1239, citing *United States* v. *Cianchetti,* 315 F.2d 584, 589 (2d Cir. 1963). Since Jermain put in no proof of withdrawal, the Government was entitled to the benefit of a presumption that Jermain's involvement continued until his arrest. The trial court, however, chose to leave the matter to the jury.

** Jermain's rambling attack on the district court's charge raises no issue of any substance. His principle argument appears to be that the trial court allegedly failed to provide the jury with guidelines to aid them in resolving the issue of whether a single conspiracy had been proved. Jermain, however, did not except to the charge on this ground and never suggested what these guidelines were. The trial court's charge on the issue of single conspiracy was entirely proper, and the trial court explicitly instructed the jury to consider the guilt or innocence of each defendant on an individual basis (Tr. 3941-3942). See *United States* v. *Bynum, supra,* at 497.

[Footnote continued on following page]

Capra's objection to the alleged variance between the conspiracy count and the proof is even less persuasive. Overwhelming proof was adduced at trial from which the jury could have concluded that Capra was involved in a single conspiracy. The proof showed that Capra was instrumental in persuading Ramos to join his narcotics operations in 1969; he encouraged the formation, in 1970, of the "partnership" between Ramos and Jermain; he was central to consummation of the Harris transactions; throughout 1971 he supplied Ramos and Jermain with narcotics knowing that the drugs would be sold to Morris; he was overheard on the Diane's Bar wiretap in connection with a drug delivery to Jack Brown; and finally, he was critical to the enlistment in the illegal venture of co-conspirator Herbert Sperling as early as April, 1971. Capra's sole concern, as conclusively demonstrated at trial, was the creation of a large-scale, efficient and profitable operation for the purpose of distributing narcotics in New York and in the mid-western United States. As the evidence showed and as the jury properly found, he accomplished his purpose from July, 1969, until his arrest in April, 1973, by means of a single on-going conspiracy.

Jermain's talismanic invocation of *United States* v. *Borelli*, *supra*, and *United States* v. *Russano*, 257 F.2d 712 (2d Cir. 1958), simply ignores the critical factual distinctions between those cases and the conspiracy proved below. Here the defendants were active core conspirators, involved in a continuous course of dealing over a 4 year period. *Borelli*, which disclosed a 9 year conspiracy whose two phases were separated by a period of 8 years, and *Russano* which involved a hiatus of 3 years between the end of the first conspiracy and the beginning of the second, are simply inapposite. As Judge Friendly noted specially in *Borelli*, "[b]y no means every conspiracy trial will raise the problem here considered. Often the defendant's act will not have the ambiguity with respect to the inference of agreement . . . ; even in cases where some ambiguity exists, the precise scope of his agreement would not always be sufficiently important that the judge would be required to stress it in his charge; here . . . the problem of limitations . . . could be critical." 336 F.2d at 385-86.

But even assuming, *arguendo,* the evidence at trial disclosed discrete, multiple conspiracies, reversal is not required. A variance between indictment and proof requires reversal only if the variance is material, *United States* v. *Berger,* 295 U.S. 78 (1935) and prejudices substantial rights. *United States* v. *Agueci, supra,* 310 F.2d at 827. Since the evidence linked Capra to every conceivable conspiracy that might be inferred from the proof, Capra suffered no prejudice as a result of any alleged variance from the indictment. *See United States* v. *Calabro,* 467 F.2d 973 (2d Cir. 1972), *cert. denied,* 410 U.S. 926 (1973); *United States* v. *Vega,* 458 F.2d 1234, *cert. denied, as Guridi* v. *United States,* 410 U.S. 982 (1973).

Even a charitable reading of the brief submitted on behalf of appellant Morris fails to disclose an arguable, let alone persuasive, claim with respect to the conspiracy charged in the indictment. To be sure, the trial court was of the view that Morris' involvement in conspiratorial activities terminated at the time of his arrest on October 31, 1971. Accordingly, in language too crystal clear to permit confusion, the trial judge instructed the jury as follows:

> You will recall the undisputed fact that Morris was taken into custody on October 31, 1971. As to him, I give you this very simple instruction. I instruct you that whatever you find may have been the situation before that date, before October 31, 1971, you may not consider against Morris any acts or declarations of other people occurring after the date (Tr. 3946-3947).

Morris was more than adequately protected by the Court's instruction.*

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* Morris, like Jermain, probably was aided by a charge which gave him more than was required by law. The evidence showed that Sperling had been brought into the conspiracy as early as April, 1971, during a period in which Morris' activity in the

[Footnote continued on following page]

In view of the abundant evidence which unequivocally established the existence of a single conspiracy, and in light of the court's protective instruction with respect to Morris, the claims of error concerning Judge Frankel's refusal to grant a severance are meritless. Capra, for example, insists his trial should have been severed because evidence, seized from defendant Dellacava's automobile, and introduced at trial, could have implicated Capra. Yet, as Capra concedes, the principal fear in this respect was that "as a result of the pre-existing relationship between Dellecava and Capra, the jury could have inferred that this was part of a continuing relationship" (Capra Br., at 61). Clearly such an inference, in view of the evidence, was wholly proper.

The granting of a severance rests within the sound discretion of the court. F.R. Crim. P. 14; *United States* v. *Cassino*, 467 F.2d 610, 622 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973), and the refusal to sever in this case was wholly proper. See, e.g., *United States* v. *Bynum, supra*, 485 F.2d at 497-499; *United States* v. *Vega, supra*, 458 F.2d at 1236.

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conspiracy concededly was great. Morris was willing to take delivery of narcotics, whatever its original source; he "knew from the scope of the operation that others were involved in the performance of functions vital to the success involved in the performance of functions vital to the success of the business." *United States* v. *Bynum, supra*, 485 F.2d at 496. Accordingly, the Sperling connection was well within "the operation of the conspiracy as [Morris] understood it." *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir. 1969), *cert. denied* as *Haywood* v. *United States*, 396 U.S. 852 (1969), and he was chargeable with acts of co-conspirators committed even subsequent to his arrest. Morris' arrest did not terminate his liability for the continuing acts of the conspiracy inasmuch as "[n]either authority nor reason would suggest that imprisonment necessarily shows a withdrawal." *United States* v. *Borelli, supra*, 336 F.2d at 389-390; see also, *United States* v. *Agueci, supra*, 310 F. at 838-39.

POINT VI

None of the other claims have merit.

1. Count One was not duplicitous

Capra argues that Count One of the indictment is duplicitous because it alleged a conspiracy to violate 26 U.S.C. §§ 4705(a) and 7237(b) and 21 U.S.C. § 846. The argument lacks merit. Count One charged a single, continuing conspiracy to violate the federal narcotics laws, spanning the period from July, 1969 through May 16, 1973, the date of the filing of the indictment. On May 1, 1971, The Comprehensive Drug Abuse and Prevention Act of 1970, 21 U.S.C. § 801 *et seq.*, became effective and replaced, among others, the statutory prohibitions against dealing in narcotoics set forth in 26 U.S.C. §§ 4705(a) and 7237(b). "Both laws were relied upon because [two] overt acts of the conspiracy were charged to have occurred while [26 U.S.C. §§ 4705(a) and 7237(b)] were still in effect and the other [five] overt acts charged in the indictment occurred after May 1, 1971, the effective date of the new law." *United States* v. *Kella,* 490 F.2d 1095 (2d Cir. 1974). Since Count One charged only one offense, "[t]he fact that the alleged conspiracy includes the violation of more than one federal statute does not make it duplicitous." *Overstreet* v. *United States,* 321 F.2d 459, 461 (5th Cir. 1963), *cert. denied,* 376 U.S. 919 (1964) (conspiracy to violate 21 U.S.C. § 176(a) and 26 U.S.C. § 4744(1). See also, *Braverman* v. *United States,* 317 U.S. 49 54 (1942); *United States* v. *Levine,* 457 F.2d 1186, 1189 (10th Cir. 1972); *United States* v. *Know Coal Co.,* 347 F.2d 33, 39 (3d Cir.), *cert. denied as Lippi* v. *United States,* 382 U.S. 904 (1965); *Danielson* v. *United States,* 321 F.2d 441, 443 (9th Cir. 1963); *Schnautz* v. *United States,* 263 F.2d 525, 530 (5th Cir.), *cert. denied,* 360 U.S. 910 (1959); *Carrado* v. *United States,* 210 F.2d 712, 716-717 (D.C. Cir. 1953), *cert. denied* as *Atkins* v. *United States,* 347 U.S. 1018 (1954); *United*

States v. *Lutwack,* 195 F.2d 748, 753 (7th Cir. 1952), *aff'd,* 344 U.S. 604 (1953); *Troutman* v. *United States,* 100 F.2d 628, 632 (10th Cir. 1939); *United States* v. *Sanders,* 266 F. Supp. 615, 621 (W.D. La. 1967), *aff'd,* 415 F.2d 621 (5th Cir. 1968).*

2. Instructions to the jury

Various appellants assert that the trial court erred in the timing and content of certain instructions to the jury. The claims are frivolous. First, Dellacava complains that limiting instructions were not given when certain evidence was received which could only be considered against some of the defendants after they were found to be members of the conspiracy by a fair preponderance of the independent evidence. The trial court indicated that a limiting instruction would be given when and if required. Whatever merit there might be to Dellacava's claim were he ultimately not shown to have been a member of the conspiracy by such a fair preponderance of the independent evidence is beside the point, since no claim is made that the fair preponderance standard has not been met with respect to his membership. Since the hearsay declarations of co-conspirators could thus be considered against him, the absence of a prior limiting instruction cannot have been prejudicial. Next Dellacava and Capra claim that in the following excerpt the court incorrectly charged the jury with respect to the standard of proof required to establish guilt.

> ". . . if a jury finds from a preponderance of the independent evidence as to each individual alleged member, that . . . A, B and C are all members of a conspiracy, then the acts or declarations of A, even in the absence of B and C, may be taken as evidence

* Capra did not suffer any prejudice because Count one alleged a conspiracy to violate both statutes. Notwithstanding Capra's contention to the contrary, Judge Frankel's instructions concerning the statutes involved (Tr. 3911-13) and the conspiracy count in general (Tr. 3929-53) clearly and correctly explained the applicable legal principles.

> against B and C, provided that those acts or declarations occur during the conspiracy and in furtherance of it" (Tr. 3942).

Appellants ignore the fact that this portion of the charge did not relate to the standard of proof on overall guilt at all. Indeed, immediately prior to the complained of portion of the charge, the court emphasized that the jury had to determine "whether membership as asserted has been proved beyond a reasonable doubt" (Tr. 3942). This was the second time the court stressed the reasonable doubt standard on the issue of membership (see Tr. 3938). Moreover, the court had previously announced the reasonable doubt standard no fewer than five other times with respect to the charges in general and with respect to other particular elements of the various counts (Tr. 3903, 3905, 3917, 3923, 3932). The challenged excerpt clearly related to the fair preponderance standard which had to be met before the hearsay declarations of co-conspirators could be considered. As such, it gave Dellacava and Capra more than they were entitled to since it allowed the jury to reconsider an issue which is for the judge to decide. *United States* v. *Zane,* slip op. 2493, 2506-07, — F.2d — (2d Cir., April 1, 1974); *United States* v. *Projansky,* 465 F.2d 123, 137-38 (2d Cir.), *cert. denied,* 409 U.S. 1006 (1972).; *United States* v. *Nuccio,* 373 F.2d 168, 173 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967).

Dellacava's additional contention that the court did not adequately focus the jury's attention on the need to determine the question of guilt separately with respect to the evidence against each defendant also is refuted by an examination of the charge which must be considered as a whole (Tr. 3908, 3937, 3938, 3941). *E.g. United States* v. *Hernandez,* 361 F.2d 446 (2d Cir. 1966); *United States* v. *Hines,* 256 F.2d 561 (2d Cir. 1958); see also *Cupp* v. *Naughton,* 42 U.S.L.W. 4029, 4030 (U.S., December 4, 1973).

3. Double jeopardy

Morris contends that the instant prosecution placed him twice in jeopardy in violation of the Fifth Amendment because he had previously been convicted in the Ohio state courts and in the United States District Court for the Eastern District of Michigan for narcotics offenses. The argument lacks merit.

On August 19, 1972 Morris was convicted after a jury trial in the Lucas County Court, Toledo, Ohio of conspiracy to violate Ohio's narcotics laws and possession of narcotic drugs. The prosecution arose out of the seizure of the suitcase in Toledo on October 20, 1971 and Morris' arrest on October 31st when he and Middlebrook went to the Central Union railroad terminal to pick up the suitcase. It is perfectly clear that even if the instant federal prosecution had been limited to that single transaction, it was not prohibited by the Double Jeopardy Clause. See *Abbate* v. *United States,* 359 U.S. 187 (1959); *cf. Bartkus* v. *Illinois,* 359 U.S. 121 (1959). In point of fact, however, the proof against Morris in the instant prosecution was not limited to the Toledo seizure, but revealed his participation in a narcotics conspiracy of far greater scope and magnitude and antedating the events of October, 1971.

On March 16, 1971 Morris was indicted in the Eastern District of Michigan for possessing on December 8, 1970 11 grams of heroin in violation of 21 U.S.C. § 174. He entered a plea of guilty to this charge in 1973 and was sentenced to five years imprisonment to run consecutively to the sentence imposed by the Ohio court.

Morris was not charged with this offense in the instant prosecution. Nor was any evidence relating to his possession of this 11 grams of heroin introduced at the trial below.

The claim of double jeopardy must therefore fall. *United States* v. *McCall,* 489 F.2d 359, 361-63 (2d Cir. 1973); *United States* v. *Nathan,* 476 F.2d 456, 458-459 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973). Furthermore, the claim of double jeopardy based on the prior federal conviction in Michigan was not raised before or after trial (Tr. 131-135), and was thus waived. *United States* v. *Wilson* 32 U.S. 150 (1833); *United States* v. *Scott,* 464 F.2d 832, 833 (D.C. Cir. 1972); *United States* v. *Buonomo,* 441 F.2d 922, 924-25 (7th Cir.), *cert. denied,* 404 U.S. 845 (1971); *Ferina* v. *United States,* 340 F.2d 837, 838-39 (8th Cir.), *cert. denied,* 381 U.S. 902 (1965); cf. *United States* v. *Friedland,* 391 F.2d 378, 381-82 (2d Cir.), *cert. denied,* 404 U.S. 867 (1971).

4. The allegations of prejudicial prosecutorial acts during the trial are without merit

Various appellants accuse the Government of misconduct during the course of the trial, but none of the matters relied upon—either individually or collectively—demonstrate a denial of a fair trial.

The first specification of alleged misconduct rests on the contention that the jury inferred that Guarino had been in jail as a result of Ramos' direct testimony. On direct examination Ramos testified that he had been arrested for narcotics offenses in 1957, had received a 17 year sentence and had been released from prison in 1969 (Tr. 140-41). He also testified that he had known Guarino since 1959 (Tr. 144). Standing alone, these bits of testimony did not compel the conclusion that Ramos had met Guarino in prison, since there was no evidence to indicate when Ramos began serving his sentence. The missing link, however, was provided by *Guarino's trial counsel* when he established on cross-examination that Ramos remained in prison from the time of his arrest in 1957 until he was released in 1969 (Tr. 510).

Furthermore, no objection was made when Ramos testified that he had met Guarino in 1959. The belated motion

for a mistrial came three days later and was denied by the trial court as follows:

> "The Court: Well, let me just say, in denying your motion, Mr. McAlevy, that the prejudice which you say is so devastating did not manifest itself to me at all in hearing the evidence, and what appears to be even more significant is that it apparently took a three-day intervening week-end for you to work up this motion.
>
> "I heard nothing about it on Friday at the time of the testimony, and I think it just passed quite unnoticed, certainly by the jury, and certainly by me and for all appearances by you" (Tr. 195-96).

The second claim of misconduct relates to an episode during the redirect examination of Roger Fuelster, a Government chemist, who testified about his analysis of the half kilo of heroin seized from Earl Simms at the Detroit Metropolitan Airport on December 8, 1970. On cross-examination, Fuelster had been asked a series of questions by Capra's attorney concerning a crude test for measuring the purity of heroin by heating the substance to its melting point (Tr. 234-35). The object of this cross-examination was an effort to discredit Ramos who had testified that this method had been used by Capra to test the heroin which he and Guarino sold (Tr. 161). Fuelster was asked, "So therefore, in your opinion, the heroin cooking and the thermometer business is not really too valid," and replied, "That's right" (Tr. 235).

On redirect examination, Fuelster was asked whether that method of testing had "any validity", and replied as follows:

> "A—It does. It is an indication of the identity and purety [sic]. Most generally used to identify the purety [sic] of street level sort of basis, French-Connection movie thing——

"The Court: Don't tell us about that." * * *

"The Court: The jury will disregard the movie, we are not going to see that picture in this case" (Tr. 243).

Unsatisfied with the trial court's instruction to disregard the volunteered remark, defense counsel moved for a mistrial. Judge Frankel denied the motion, but again emphatically admonished the jury to disregard the allusion to the movie:

"The Court: I have told you, ladies and gentlemen, more than once in the short time we have been together that this case has to be decided strictly on the evidence that is allowed into this record in this Courtroom and we are not going to read novels or consult movies or consider other wholly irrelevant things about other wholly imaginary or different situations.

"I admonish you about that at this time. I think the chemist would have done better not to mention that motion picture he may have seen but you will understand that you are absolutely to disregard it and anything else I tell you to disregard and with that I think we can proceed" (Tr. 244-45).

It is clear from the record that the reference to the movie was volunteered by the witness in an unwise attempt to explain his testimony and was not part of a calculated effort by the Government to prejudice any of the defendants. In light of the prompt and emphatic instructions to the jury and the overwhelming evidence against the defendants, no prejudice could have resulted from this remark and the error was unquestionably harmless. *Chapman* v. *California,* 386 U.S. 18, 24 (1967); *United States* v. *Sawyer,* 469 F.2d 450, 452-53 (2d Cir. 1972); *United States* v. *Chason,* 451 F.2d 301, 305 (2d Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972); *United States* v. *Semensohn,* 421 F.2d 1206, 1208 (2d Cir. 1970).

The third instance of alleged misconduct relates to the cross-examination of co-conspirator Herbert Sperling. Sperling on cross-examination admitted having pleaded guilty to seven counts of a 1959 indictment charging him with violations of the federal narcotics laws (Tr. 3330-31). After eliciting that Sperling had pleaded guilty to Count 17, Government counsel's next question was interrupted by an objection, as follows:

> "Q. Did Count 17 charge that the defendants Joseph Valachi, Ralph Wagner, Herbert Sperling and——
>
> "Mr. Slotnick: I object to this question.
>
> "The Court: Wait a second" (Tr. 3331).

The trial court instructed the jury to disregard the list of names (Tr. 3332). Government counsel rephrased the question and Sperling admitted to having pleaded guilty to Count 17 which charged him and others with conspiracy to violate the federal narcotics laws (Tr. 3332). Following a side bar conference, Judge Frankel again instructed the jury to disregard the names mentioned:

> "[L]et me . . . remind you that the question which I held was an improper question by government counsel, listing some names relating back to 1959, has been ruled improper, and let me remind you that those ancient circumstances and those names have nothing whatsoever to do with this case, and you should follow that" (Tr. 3364).

It is undisputed on this appeal that the use of the 1959 conviction to impeach Sperling was proper. *United States* v. *Puco*, 453 F.2d 539, 541 n.5 (2d Cir. 1971); *United States* v. *Christophe*, 470 F.2d 865, 870 (2d Cir. 1972), *cert. denied* as *Pierro* v. *United States*, 411 U.S. 964 (1973). The allegation of prejudice is confined to the reference to Valachi. Clearly, however, Sperling's testimony for the defense was

not discredited by the mention of Valachi. Rather it resulted from his substantial criminal record of felony convictions, including two for narcotics offenses, which the Government properly elicited, his arrogant manner, the inherent incredibility of his story and a host of damning admissions. In the context of this record, including the repeated protective instructions given by Judge Frankel, it cannot possibly justify granting a new trial to appellants whose guilt was shown by overwhelming proof.

Appellants also challenge the propriety of certain questions asked by Government counsel of Milton Julert and Ruthella Raudebush who identified Ramos as the man whom they saw in Toledo on October 20, 1971. The argument is without substance.

As previously mentioned, Ramos admitted his participation in the events leading to the delivery of the 6½ kilos of narcotics to Toledo, but denied that he personally had delivered the suitcase. Both Julert and Raudebush had identified Ramos, at his trial in Ohio, as the man whom they saw. Nevertheless, the Government called both of them during its direct case and thus sought to have all the facts placed before the jury. The accuracy of their identification of Ramos, however, was somewhat undermined when, during the course of the trial below, they were unable to identify Ramos in a group photograph taken at a New York nightclub in which Ramos, Jermain, Capra and others were shown seated at a table (GX 15). The Government sought to have this fact placed before the jury so that they could consider the significance of the eyewitness testimony in the context of all the available evidence concerning the identity of the man who went to Toledo.

As far as Miss Raudebush is concerned, none of the defense counsel objected to her redirect examination during which she admitted her inability to identify Ramos in the nightclub photograph (Tr. 2364-65). Her testimony in this

respect, as the trial court ruled, was entirely proper (Tr. 2366).

When the Government recalled Julert to the witness stand at the close of its case in chief, Judge Frankel refused a request by the government to explore the matter of Julert's mis-identification of Ramos in the photograph, ruling that it should have been covered when he first testified (Tr. 2957). Government counsel then attempted to ask Julert if he had had a recent unrelated experience in which he had misidentified someone else, but was interrupted in the middle of his question by an objection which was sustained. In short there was no error and no prejudice.

The final accusation of misconduct relates to the circumstances surrounding the jury's request during its deliberations for Government Exhibit 21, the note containing figures written by Capra which was found on Morris when he was arrested on October 31, 1971. The claim of misconduct is baseless.

The defense had attacked Ramos' testimony that Capra had written the note and relied, in part, on the inability of the Government's handwriting expert to render an opinion that Capra had written the figures on the note. Specimens of Capra's handwriting (DX-L-AC) and the sheet on which Capra signed in the United States Attorney's office while on bail (GX 135) were introduced in evidence. During summation, Capra's attorney specifically invited the jury to ask for these exhibits during their deliberations, compare them with the note and determine whether or not Capra wrote the note (Tr. 3797-98). The jury accepted the invitation and during its deliberations requested Capra's handwriting exemplars and the sign-in sheet, but in some obvious confusion, requested Government's Exhibits 21A and 21B (an envelope and a note written by someone else) instead of the note in question. Judge Frankel decided that the

jury would only be given that which they requested and told them:

> "On the left-hand side of your latest note you list certain exhibits, 21A and B, Capra's exemplars, sign-in sheets. We are going to give you exactly what you asked for, not more and not less" (Tr. 4034).

Thereafter, the jury sent another note requesting some additional testimony. After it was read, the foreman of the jury, who had realized that the jury had not received the exhibit which they really wanted, pointed to Government Exhibit 21 and stated as follows:

> "The Foreman: That is the paper that we really want, that little note.
>
> That is 21?
>
> "Mr. Feld: Yes.
>
> "The Foreman: That is the one they wanted. They made a mistake on the request.
>
> "The Court: On the number.
>
> "The Foreman: Yes.
>
> "The Court: Mr. Edgehill [the foreman] is asking for Exhibit 21 and he has been given it and, with that will you please retire, ladies and gentlemen" (Tr. 4038-39).

The allegation that Government counsel was "waving" the exhibit to the jury was denied below and has no basis in fact (Tr. 4039). In any event it is clear that Guarino could not possibly have been harmed when the jury rectified their erroneous request and received the exhibit, which Capra specifically invited them to examine. Furthermore, as the record reflects, Guarino did not join in Capra's motion for a mistrial which Judge Frankel properly denied (Tr. 4040-41).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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